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EVIDENCE OF EVIL PROPENSITY

A Note on *R. v. Sims* *

It is common ground that the mixture of common law with statute-made law which distinguishes the English legal system shows itself in the least favourable light in the sphere of the so-called adjective law, the law relating to procedure and evidence. Our rules of evidence have grown in a haphazard way : judges in their decisions and the Legislature in its occasional excursions into this field have been concerned less with the establishment of a systematic and coherent body of law than with a sensible ad hoc solution of certain definite problems. Unfortunately, some rules of evidence, as, *e.g.*, the rule against hearsay evidence, have in the process become so complicated and overgrown with exceptions that nothing short of a decisive step of the Legislature seems now capable of unravelling the tangle.

In such circumstances, every effort of the higher Courts to clear the field, or at least a section of it, of such growths in the shape of decided cases as have come to obscure or, indeed, entirely to overshadow the trunk of the tree, may become an extremely daring and even hazardous venture. The basic principles having sometimes been lost to sight, a cool analysis of available precedents is bound to reveal contrasts and conflicting decisions which are extremely difficult to reconcile. Any attempt to re-state the principles is likely to meet with the objection that it is revolutionary, unjustifiable and bad law.

Into such a thicket the Lord Chief Justice ventured when he took the—surely laudable—resolve to tackle the question of admissibility of evidence of similar acts and bad disposition in the recent case of *R.* v. *Sims*. Fortunately, it cannot be said that he blundered into the matter, for on the hearing of the application for leave to appeal Lord Goddard determined, in view of the importance of the question involved, to arrange for a court of five judges to hear the appeal.

Nor were the facts of the case in any way complicated: Sims was charged on an indictment containing a number of counts, including three which alleged buggery with three different men and another gross indecency with a fourth man. He was found guilty of buggery with the three men, and acquitted of gross indecency with the fourth. An application for separate trials in respect of each separate man

* [1946] K.B. 531.

involved (under the Indictments Act, 1915, s. 5 (iii)) having been refused, the main point raised upon appeal was that the judge should have ordered separate trials in respect of each man.

It is known that applications for separate trial have in such circumstances frequently been granted under the trial judge's discretionary power, perhaps 'ex majore cautela'. In *R.* v. *Sims* the appellant's case was that the accused had been improperly prejudiced by the joint trial, because on a trial for buggery or gross indecency with one man evidence of offences committed with the other men was said to be inadmissible. The Court of Criminal Appeal agreed that, in such a case, it would be asking too much of any jury to disregard, when considering one charge, the evidence on the others, and that, if the evidence was in fact inadmissible, no direction by the judge would have been sufficient to overcome the danger of improper prejudice. Here, for all practicable purposes, we can dismiss the technical question of joinder of indictment from the discussion of this case, and the issue of the admissibility of evidence of similar acts and bad propensity is squarely put.

Before dealing with the judgment it might be well to anticipate the result: the appeal failed, the contention of the appellant that evidence of offences committed with the other men was inadmissible being rejected.

Even those who maintain that there is a general rule excluding evidence of similar acts and bad propensity admit that the rule is subject to a number of important exceptions. Buggery and gross indecency were described by Lord Sumner in *Thompson* v. *R.* [1918] A.C. at p. 235 as offences which 'stamp' the offenders 'with the hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity'. In that case, as in *R.* v. *Twiss* [1918] 2 K.B. 853 evidence was held admissible of the fact that the prisoner was in possession of photographs of nude boys in order to show sexual perversion, *i.e.*, 'what the accused who had the materials about him is'. Repetition in this type of case provides a vital touchstone, and if the court had been prepared to decide the matter on this narrow issue alone a 'point of great importance', in the words of the Lord Chief Justice, hardly arose in *R.* v. *Sims*.

But while it may possibly be argued in future that the decision in *R.* v. *Sims* is a binding authority only for the proposition that on the trial for unnatural offences committed with men, evidence of similar acts committed with other men is admissible, it seems clear from the judgment that the Court of Criminal Appeal set out to deal with the wider field of admissibility of evidence of similar acts and that the court intended to, and in fact did, re-state the basic rules governing it. It becomes, therefore, inevitable to consider the general problem.

All evidence tendered in a criminal trial must in English law be directed to the sole aim of proving the offence in issue. This means

that only such facts can be proved against the prisoner as have some probative value to form the possible basis of the verdict, in other words, are relevant to the issue.[1] Whether previous or subsequent conduct of the prisoner is so relevant to the issue is a question of fact, to which no abstract answer can be given, but generally speaking it is not unless some direct connection with the facts in issue can be established. The necessity of proving such direct connection with the issue exists, regardless whether the evidence sought to be tendered is evidence of collateral or similar acts, character, whether in the meaning of reputation or of general disposition, or of previous convictions. Thus it is, *e.g.*, on principle improper, because irrelevant, to ask the prisoner whether he has been previously suspected or accused of some other crime (*Stirland* v. *D.P.P.*), for evidence that a person has committed other criminal offences is in logic irrelevant to bring home to him the specific offence charged. Even proof that he has, on other occasions, done one or several acts similar to the one in issue is clearly by itself completely incapable of establishing that he has committed that crime with which he is being charged and is therefore irrelevant.

Evidence of behaviour of the prisoner on other occasions may, on the other hand, in certain circumstances make it possible to draw conclusions about his habits and way of life or about his personality and character (in the sense of mental disposition). Evidence that the prisoner has a poor reputation in the neighbourhood for honesty, or that he has repeatedly been convicted of criminal offences, leads to the inference that there is something in his personality which makes him in this respect different from the majority of his fellow-men. Mere propensity of a person to do certain acts is of course by itself not remotely sufficient to prove that the accused did, in a

[1] The courts have not always troubled to state expressly whether they regarded rejected evidence as ' irrelevant ' or ' inadmissible ', or have even treated both terms as synonymous and interchangeable. This has sometimes led to confusion of thought. Irrelevant information is valueless and therefore always excluded; strictly speaking, the term ' this evidence is inadmissible ' means that the evidence is relevant, but, for some other reason and by specific rule of law, not allowed to be introduced at the trial of the issue at hand. If this is kept in mind, it matters little in practice whether one says that evidence which merely goes to show that the prisoner is of bad disposition or propensity is regarded as ab initio irrelevant on the trial for a specific offence or whether, admitting that propensity as such may have some relevance to the issue, one considers it inadmissible by rule of law, established because the prejudice likely to be created by this kind of evidence is out of proportion to its objective value and outweighs entirely any gain there might be to the ascertainment of truth. If one accepts the view (expressed for instance by Lord Sumner in *Thompson* v. *R.*) that such evidence is prima facie irrelevant, it would appear clear that as soon as relevance of the evidence for some purpose other than proving that the prisoner is a bad man can be shown, the evidence is admissible. If, on the other hand, one accepts the view that evidence of evil propensity and bad character is relevant, but rendered inadmissible by rule of law because of its tendency to create prejudice (the opinion expressed for instance by Willes J. in *R.* v. *Rowton* (1865) L. & C. 520) the question arises as to the scope of this rule of exclusion and it is to this question that the Court of Appeal addressed itself in *R.* v. *Sims*.

particular instance, commit such an act. On the other hand, propensity to behaviour of a certain kind and especially towards certain crimes may well have some bearing on the issue before the court, since it makes it likely that he rather than a third person committed the offence in question.

There is, however, no doubt that such evidence is by itself inconclusive and highly prejudicial. In the first place, propensity of the prisoner to behaviour of a certain kind may distinguish him from a number of other people, but rarely distinguishes him from all others; logically, it can only lead to the conclusion that he is more likely than others to have committed the offence charged, but not that he is more likely than all others or that he is certain to have committed the offence.

Moreover, an opinion about a person's character and mental disposition can only be gained from a detailed analysis and investigation of his past life. Statements and questions about his past actions compel the prisoner not only to defend himself against the charge brought forward at the trial but to explain and justify his whole career. This would place him in an impossible position. For this reason, all evidence which merely goes to show that the prisoner is a person of bad character is by rule of law inadmissible. In the words of Channell J. in *R.* v. *Fisher* [1910] 1 K.B. at p. 152 : ' The principle is that the prosecution are not allowed to prove that the prisoner has committed the offence by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried '.

Any evidence calculated to show that the prisoner is a bad man, and in particular that he has been in trouble before, is strictly excluded in English law. The courts are very careful that no suggestion should be made to the jury before verdict that the prisoner is ' a bad lot '. There is a great number of cases where convictions have been quashed on appeal on the ground that evidence of similar acts, especially previous convictions, had been let in casually or by mistake, *e.g.*, *R.* v. *Firth* (1938) 26 C.A.R. 148, *R.* v. *Guerin* (1931) 23 C.A.R. 39, *R.* v. *Cohen* [1938] 3 All E.R. 380.

Unfortunately, the rule concerning similar acts has frequently been stated in a very general and absolute form as altogether precluding the prosecution from proving that the accused has committed crimes other than those charged or that he is of bad character. Most text-books still state the general principle that facts relevant through similarity to the main fact or transaction are not admissible to show its existence unless certain exceptions arise.

Julius Stone (in 46 *Harvard Law Review* pp. 954–985) some fifteen years ago published an admirable and exhaustive article in which he considered the history of the problem and examined the modern treatment of similar fact evidence. From this essay it appears

that, like many institutions which are believed to be of ancient and immemorial origin, rules excluding similar fact evidence are hardly more than 150 years old and amounted originally to no more than the following: ' Evidence which is relevant as showing that a person has a propensity to do acts of a certain kind is not admissible to prove that he did any such acts '. A tendency to widen this rule so as to exclude very relevant evidence, a tendency very marked towards the end of the last century and at the beginning of this, has recently been followed by a reverse trend, and Stone holds the opinion that the rule as stated above still represents the law today. In *R.* v. *Sims* the Court of Criminal Appeal firmly pronounced the view that the rule excluding similar fact evidence is an exception to the basic principle of admissibility of all relevant evidence, and that this exception does not go further ' than the interests of justice demand '.

The locus classicus for the modern treatment of the subject is Lord Herschell's judgment in *Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 57 : ' It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. The mere fact that evidence tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the facts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused '.

The fact that Lord Herschell at the end of the last quoted sentence saw fit to give examples of certain cases in which he thought evidence of similar acts was clearly relevant and admissible, has not infrequently been interpreted in subsequent decisions as a confirmation of the view that such evidence was prima facie inadmissible unless it could be brought under one of a few definite exceptions. These exceptions covered some of the most obvious cases where the exclusion of evidence of previous acts, connected with the issue, would withhold from the court material essential to the assessment of the facts such as when either a course or system of conduct is involved, or where accident or lack of knowledge is the defence. One of the leading cases for this wide rule of exclusion is *R.* v. *Bond* [1906] 2 K.B. 389, an abortion case. Evidence was called that nine months before the offence in issue the accused had used similar instruments upon another woman with the avowed intention of bringing about a miscarriage and that he had used words to show that he was in the habit of performing such operations. It was argued on behalf of the prisoner that the evidence introduced was inadmissible, since it could not be brought

within the principle of any case in which similar evidence had previously been admitted. Alverstone L.C.J. went to some trouble to state systematically the various instances in which—exceptionally—similar act evidence was in his view admissible and came to the conclusion that the evidence tendered against the doctor did not fall within any of the acknowledged exceptions. Although his was eventually a minority judgment, because a majority of the court had come to the conclusion that the evidence in question did fall within the recognised exception as proving 'system' or 'course of conduct' on the part of the doctor, the exposition of Lord Alverstone and of Bray J. (who thought that the cases where evidence of similar acts had exceptionally been admitted could be grouped under three heads) of the general comprehensive rule was for some time considered authoritative. The case is, however, profoundly unsatisfactory, because there is nothing in the report to show exactly what the majority of the court did agree on, apart from the fact that the particular evidence tendered was admissible. Moreover, the judgment of at least one member of the court, A. T. Lawrence J. (at p. 424), took a much less doctrinaire line: 'In all cases, to make evidence of this class admissible', said the learned judge, 'there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method or in circumstance, there must be a nexus between the two sets of facts, otherwise no inference can be safely deduced therefrom'.

It cannot be denied that for a time after *R.* v. *Bond* the courts frequently acted on the assumption that there existed a general comprehensive rule excluding evidence of propensity and bad disposition, however relevant it might be, and that such evidence could be admitted only if it can be brought under one of the recognised exceptions. But it was rapidly found that the limited exceptions enumerated in *R.* v. *Bond* were insufficient to cover all the cases where admission of such evidence was clearly desirable and, indeed, essential in the interests of justice. As early as 1912 (in the sixth edition of his *Treatise on Circumstantial Evidence*) Wills added, without however giving detailed illustrations, the general proviso that evidence of similar acts is admissible 'whenever relevant to make out any step in proof of the offence charged' (p. 77). Such step in proof may be evidence of 'system and method' or evidence of 'intent' as enumerated in *R.* v. *Bond*, but it seems clear that Wills did not consider the category by any means a closed one.

Nor is it indeed possible to bring all the cases in which evidence of similar acts has been held admissible in the last forty years within the narrow confines of pre-determined exceptions without unduly straining the facts. For this reason, in *R.* v. *Sims*, the Court of Criminal Appeal, after a careful consideration of the whole subject, came to the following conclusion: 'Evidence is not to be excluded merely because it tends to show the accused to be of bad disposition,

but only if it shows nothing more '. The court has arrived at exactly the position argued by Stone fifteen years earlier: ' There is no broad rule of exclusion with exceptions, but only a broad rule of admissibility where there is relevance, except where the only relevance is via disposition '. The general proposition as established by the Court of Criminal Appeal in *R.* v. *Sims* is nothing radically new, for what is this ' something more ' which the evidence must show, the relevance other than merely via disposition ? In the words of A. T. Lawrence J. quoted above : ' There must be a nexus between the two sets of facts, otherwise no inference can safely be deduced therefrom '; in the words of *R.* v. *Sims* there must be ' specific features connecting the evidence with the crime charged as distinct from evidence that he (the prisoner) is of bad disposition '.

The authorities considered in detail in *R.* v. *Sims* were mainly concerned with evidence of other unnatural offences, where this nexus is provided by the ' habitual gratification of perverted lust '.[2] Generally speaking, no a priori rules can be laid down about these specific features which must connect the evidence sought to be admitted with the crime charged, and it is clearly the duty of the court to consider carefully whether sufficiently close similarity does in any particular case render the evidence relevant and thus warrants its admission.

In *R.* v. *Dale* (1889) 16 Cox C.C. 703, upon an indictment for using a quill to bring about miscarriage, evidence that the prisoner had made use of a quill for similar purposes on other occasions was admitted. In *R.* v. *Armstrong* [1922] 2 K.B. 555, on a charge of murder by arsenic, evidence was admitted of a subsequent attempt to administer the same poison. In *R.* v. *Starkie* [1922] 2 K.B. 275 the indictment contained two charges: attempt to procure miscarriage by use of instruments and administering poison with the same intent. Although the prisoner was acquitted on the first charge, evidence on the use of instruments was held admissible for conviction on the second charge.[3] *R.* v. *Taylor* (1927) 20 C.A.R. 71 was a case of manslaughter by reckless driving. Evidence was admitted of reckless driving at the point several miles from the accident, although there had been a break in the journey between the two points. In *R.* v. *Mortimer* (1936) 25 C.A.R. 150 a soldier running amok had driven into women cyclists and was charged with murder. Evidence of other incidents was admitted to show that his actions were deliberate and intentional. In *R.* v. *Dossott* 2 C. & K. 306, on an arson charge, the prisoner's intent was proved by evidence that on two successive days he had set fire to a hayrick. In *R.* v. *Wood* [1920] 2 K.B. 179 evidence of a previous

[2] Even here, careful distinctions may have to be drawn, as appears from the remarks made in the judgment concerning *R.* v. *Southern*.

[3] In *R.* v. *Neil Cream* (1892 Notable Trials), the trial of a doctor for murder, the judge admitted evidence of three deaths under similar circumstances as corroboration.

conviction for assault committed at eight o'clock was at a subsequent trial admitted on a charge of indecent assault at seven o'clock of the same day.

In all these cases, the connection between the other acts and the crime charged was established by the close similarity or even identity in the main features of the various acts. But identity of the offence does not necessarily provide a sufficient link. This is clearly shown in cases dealing with charges for false pretences. In *R.* v. *Porter* (1935) 25 C.A.R. 59, on such a charge, evidence of false pretences committed two and a half years before was admitted. *R.* v. *Rhodes* [1899] 1 Q.B. 77 is an authority for the proposition that evidence of subsequent false pretences may be admissible. On the other hand, in *R.* v. *Ellis* [1910] 2 K.B. 746 the appellant had been convicted for obtaining cheques by false pretences, mainly by stating that the cost price of certain articles had been much higher than it in fact was. Evidence that he had represented spurious pieces as genuine old china was held 'entirely distinct' from the charge and not admissible.[4]

A difficult case is *R.* v. *Carmen Tomasso* (1934) 25 C.A.R. 14. There, tried on a charge of possessing counterfeit coins with intent to utter them, the prisoner admitted possession with knowledge that the coins were counterfeit, but denied intent to utter them and asserted that he had taken the coins deliberately in order to gain evidence against a third person. On appeal, cross-examination about a previous conviction eight years earlier for the same offence was held to have been inadmissible and the conviction quashed. The ratio decidendi does not appear clearly from the report. It might be argued that the lapse of such a long time had effectively broken the connection between the two offences, or again that the prisoner's conviction was not relevant to the question of intent to utter the coins.

It may be doubted whether the Court of Criminal Appeal would now be prepared to follow the decision in *R.* v. *Tomasso*, if based on the latter consideration, but it is virtually certain that it would not if the Court of Criminal Appeal in that case intended to go to the length of saying that the evidence was inadmissible because it revealed not only a previous similar offence but at the same time a previous conviction. The statutory exclusion of evidence of prior convictions of section 1, proviso f, of the Criminal Evidence Act, 1898, does clearly, under (1) not apply where evidence of previous conviction is introduced to bring home to the prisoner the offence in question. Thus, in *R.* v. *Porter* (1935) 25 C.A.R. 59, cited before, evidence was admitted of a similar offence committed by the prisoner some thirty months earlier, although the previous offence had led to a conviction, because in that case the previous

[4] See also *R.* v. *Boothby* (1933) 24 C.A.R. 112 and the notes thereto by Logan in 50 L.Q.R. 386.

conviction showed not merely general bad disposition but proved that the prisoner, in committing the offence in issue, had been acting in accordance with a system or method which became clear by comparison with the earlier offence of the same type. Although this point does not appear to have been expressly made in *R.* v. *Sims*, it makes in the present context no difference whether the similar acts introduced in evidence are criminal acts which have, or have not, been the subject of criminal proceedings and convictions, since the value of the evidence so introduced rests not in the fact of the conviction as such but solely in the close similarity between the previous act or acts and those in issue.[5]

Evidence of instruments of crime or other objects found in the prisoner's possession also raises in each case the question of connection with the offence in issue. The position is relatively simple where the same implements have actually been used, as, *e.g.*, in *Dale's Case*, quoted above. In *R.* v. *Arthur Thompson* (1917) 12 C.A.R., where the photographs in question were not used for a crime charged, Reading L.C.J. at pp. 268–9 formulated the point as follows: 'Of course evidence would not necessarily be admissible of everything found in the possession of the accused. For instance, if a burglarious instrument was found on him, it could not be given in evidence against him on a charge of committing acts of gross indecency; it would have no relevance to the issue and would merely tend to show that he was a person of bad character. But upon a trial for burglary, the finding of a burglarious implement upon him would clearly be evidence against him and a fortiori, when the only issue is whether he is the person who committed the burglary'. Bringing the point into line with its overall view, the Court of Criminal Appeal in *R.* v. *Sims* expressed the matter thus: 'If they (articles found in the possession of the accused) have no connection with the crime except to show that the accused has a bad disposition, the evidence is not admissible; but if there are any circumstances in the crime tending to show a specific connection between it and the articles, the evidence is admissible'.

There is, it is submitted, no justification for saying that the judgment in *R.* v. *Sims* has revolutionised the question of admissibility of evidence of similar acts and bad propensity. It does not affect the question of casual or accidental introduction of evidence of bad character or previous conviction for a purpose unrelated to the issue which remains excluded.[6] What the judgment has done

[5] It is quite possible, however, that in any given case the court may come to the conclusion that the time served as a result of a conviction may have effectively severed the link between two similar acts and thus destroyed the probative value of the evidence. (Cp. *Rawlings* v. *Smith* [1938] 1 All E.R. at p. 13.)

[6] If any confirmation of this should be required, it was given in unmistakable terms by Lord Goddard L.C.J. himself in *R.* v. *Butterwasser* [1947] 2 All E.R. 415.

is to settle exactly the scope of the rule excluding such evidence, and it has done so in favour of the restricted interpretation advocated by Stone. This is not only a common-sense solution which takes into account the inevitable need in many circumstances for this type of evidence in the interests of the administration of justice, but cuts across the tangle of irreconcilable dicta and brings under one comprehensible principle the numerous recent cases where 'evidence of specific acts or circumstances connecting the accused with specific features of the crime has been held admissible, even though it also tends to show him to be of bad disposition'.

What is more, the present writer believes that on the strength of recent cases any appellant court probing more deeply into this apparently vexed question was bound to arrive at the conclusions reached in *R.* v. *Sims*. How else can it be explained that the South African Court of Appeal, dealing with the same problem only a few months before the decision in *R.* v. *Sims*, in the case of *R.* v. *Katz* [1946] S.A.L.R. (AD) 71, adopted an identical point of view. 'The rule precluding the prosecution from proving that the accused has committed crimes other than the one charged or is of bad character', said Watermeyer C.J. in the case at pp. 78–9, 'is not an absolute one. It only operates to exclude such evidence when such evidence is solely relevant to show that the accused by reason of his bad character or his commission of other crimes had a criminal propensity, and was, therefore, likely to commit the crime with which he was charged. If for any other reason it is relevant to the question before the court, it is admissible'.

In this case, a butcher was charged with selling meat at prices in excess of the maximum prices fixed by the law. Evidence was given at the trial that some weeks earlier another customer had complained to the butcher about the price he was charged and had received the reply that the accused was not prepared to sell at the controlled price. Other evidence introduced at the trial consisted of the testimony of a police officer, according to which the butcher had displayed an out-of-date price list (also an offence under the Relevant Price Control Regulations) and that, a week after the old list had been torn down by the police officer, he had failed to exhibit one at all (another offence). In holding that all this evidence was rightly admitted, although it disclosed that the accused had committed offences with which he was not then charged, Watermeyer C.J., before arriving at the above quoted passage, surveyed a considerable number of South African and English precedents and rejected the wide version of the inadmissibility rule, which he traced back to Lord Herschell's judgment in *Makin's Case*. 'Since that decision', the Chief Justice of South Africa declared, 'it has sometimes been contended that the illustrations of relevancy given by Lord Herschell constitute categories into which such evidence must be fitted before it can be regarded as admissible, but this is a mistaken interpretation of the words used by Lord Herschell. The

examples he gives are mere illustrations of relevancy and were not intended to be exhaustive '.

It is submitted that *R.* v. *Sims*, by restating the principles underlying the question of admissibility of similar fact evidence and by providing a uniformly applicable test for all cases in which the question arises, has rendered a signal service to this branch of the law. The rule of exclusion of evidence of propensity and bad disposition must, it is said, ' not extend further than the interests of justice demand '; it ends where evidence of this kind shows something more than bad disposition of the prisoner, even though it tends at the same time to make him appear a bad man.

Nor is the prisoner of necessity bereft of all protection against spiteful raking up of his past. One likely result of the decision in *R.* v. *Sims* is that charges of unnatural offences against different persons will more frequently be joined in the same indictment, so that the chance of obtaining convictions against habitual sexual offenders, admittedly a special category, is considerably increased. But the reluctance of the courts in such cases to make use of the relevant provision of the Indictments Act, 1915, appears to have been largely due to the prevailing uncertainty about the admissibility of evidence and the consequent danger of reversal upon appeal, and not to any consciously felt need to give the prisoner adequate protection.

The guilty have perhaps less chance of escaping the consequences of their crime. The protection of the innocent man in the dock, on the other hand, does not lie with the rule of exclusion alone. There remains the discretionary power of the judge to take the necessary steps that evidence should not be tendered, even if strictly speaking admissible, if it is ' of little value to the prosecution and would indirectly prejudice the fair and dispassionate trial of the prisoner ' (*R.* v. *Shellaker* [1914] 1 K.B. 414, cp. also Singleton J. in *R.* v. *Peter Martin Jenkins* (1946) 31 C.A.R. 1). This discretion which was stressed by Lord Sankey L.C. in *Maxwell* v. *D.P.P.* [1935] A.C. at p. 321 may well gain in importance as a direct result of the decision in *R.* v. *Sims*, and it is submitted that this is a desirable development in the right direction, since it enables the judge at the trial to decide whether in the circumstances of the case the probative weight of such evidence outweighs its prejudice. This is not all. Even if prejudicial evidence has been admitted, the judge in his direction to the jury has ample opportunity to explain to the jury the weight that should be attached in the given case to evidence of similar acts or offences. Finally, it is submitted that where the admissibility of evidence of this type has obviously been used by the prosecution as ' a peg to hang dirty linen on ', the jury can be trusted to resent the implication and to feel sympathy rather than prejudice against a prisoner whose past has been spitefully raked up.

H. A. HAMMELMANN.

SOME ASPECTS OF SOVIET CONSTITUTIONAL THEORY

1. *The purposes of the Soviet State machine.*

It is a common failing of both friends and enemies of the U.S.S.R. to apply to Soviet institutions criteria of judgment which are quite irrelevant, both to the avowed purpose of these institutions and to their actual functioning. The aim of this paper is to examine the structure of, and the theories behind, the Soviet system of government, as these are viewed by *Soviet* constitutional theorists.[1]

It is impossible to appreciate Soviet ideas on the State, Law or Justice, without some knowledge of the Marxist-Leninist terminology which all Soviet lawyers employ. This is no place for a general discussion of Marxist theory, so it will suffice to state simply that the following concepts are accepted as *axiomatic* by Soviet theorists in this field:—

(a) 'The State always has been, and is, a coercive apparatus, with the help of which the ruling classes impose obedience on their "subjects".'[2] So long as capitalism survives, 'the exploiting classes need political rule in order to maintain exploitation, *i.e.*, the selfish interests of an insignificant minority against the vast majority of the people',[3] and, indeed, 'the more democratic (the capitalist State is), the

[1] Detailed expositions of Soviet constitutional theory and practice may be found in the following (Russian) Works:—

Vyshinski (ed.): *Soviet State Law* (Sovetskoye Gosudarstvennoye Pravo), Academy of Sciences (legal section), Moscow, 1938 (despite the date of publication, still an invaluable guide to official theory).

A. I. Denisov: *Soviet State Law* (Russian title as above), Ministry of Justice, Moscow, 1947.

Yevtikhiev and Vlasov: *Administrative Law* (Administrativnoye Pravo), Ministry of Justice, Moscow, 1946.

(The above are textbooks for law students).

The foundations of the Soviet State and Law (Osnovy Sovetskovo Gosudarstva i Pravo), a symposium edited by Professors I. D. Levin and A. V. Karass on behalf of the Law Institute of the Academy of Sciences of the U.S.S.R., Moscow, 1947 (issued by the Ministry of Justice as a textbook for students *not* specialising in law, and largely a condensed version of other books).

Articles in the periodical: *Soviet State and Law* (Sovetskoye Gosudarstvo i Pravo), published by the Legal section of the Academy of Sciences.

Various pamphlets and booklets on the Soviet State (mainly transcripts of lectures) issued in Moscow in 1946 and 1947.

Stenographic reports of the sessions of the Supreme Soviet.

Communist Party reports and resolutions, works of Lenin and Stalin, Press articles, and so on.

[2] Vyshinski, p. 13.

[3] Lenin, *State and Revolution* (English ed., p. 21).

cruder, the more cynical is this capitalist rule '.[4] While the limited rights of the people under capitalist democracy make it worth defending against fascism, ' this, however, in no way weakens the description of *any* bourgeois State . . . as an apparatus for the suppression and oppression of the toiling masses '.[5]

(b) The Soviet State, too, is an instrument of suppression, of ' dictatorship ', wielded by the working class in alliance with the peasantry, *i.e.*, by and in the interests of the mass of the people, towards the building of Communism. Although this State does, and must, restrict the freedom of those who oppose it, it is, by definition, ' a million times more democratic than the most democratic bourgeois republic '.[6] There is no contradiction, in Soviet eyes, between the Dictatorship of the Proletariat and democracy, because the dictatorship is wielded by and for the vast majority, in their own interest, through the Communist Party, which always represents their interests.

(c) As the State is an organ of class suppression, it follows that it must eventually ' wither away ' after classes are abolished.

(d) Laws are ' forms by which the ruling class in the given society sets norms of behaviour for all other classes, according to what profits and suits that ruling class '.[7]

(e) Abstract justice, in any ethical sense, cannot be invoked as a basis of Law. Justice is itself purely relative; under capitalism there can only be ' capitalist justice ', and Soviet justice, as well as Soviet law, must express the needs of a Socialist transformation of society.[8]

Both Marx and Lenin concentrated, in their theoretical formulations, on emphasising the evil character of the bourgeois class State and class law, and this, allied to the theory of the withering away of the State, led to the rise in the 'twenties of a Soviet school of law which regarded the State and law almost apologetically, as a transient phenomenon. They interpreted the increasing preoccupation of the Soviet State with economic regulation as the beginning of the withering-away process. Professor Reissner went so far as to question whether there is any need to ' dress up the proletarian dictatorship in some mysterious legal formulæ '.[9] Another leading Soviet lawyer of the period, Pashukanis, emphasised in his teachings that legal forms were a survival of the pre-Socialist, class epoch, about to wither away with the State. Much

[4] Lenin, quoted by Vyshinski, p. 13.
[5] Vyshinski, p. 14. Emphasis his.
[6] Lenin, *Proletarian Revolution* (English 1935 ed., p. 30).
[7] Vyshinski, p. 21.
[8] A useful historical survey of Soviet law and justice is contained in Schlesinger: *Soviet Legal Theory* (Kegan Paul, 1945).
[9] Reissner, *Law*, Moscow, 1925.

of Lenin's *State and Revolution* can be, and was, cited to support this view.

These theories were decisively rejected by 1936, and their advocates removed from any influence on affairs. Pashukanis, indeed, was liquidated as a ' spy and wrecker ', and his theories are now officially deemed to have been the means by which he deliberately sought to weaken the Soviet State for treasonable ends —a typically Soviet approach to the subject of political error.[10] In their place, new theoreticians produced the ideas which found their institutional expression in the ' Stalin Constitution '.

In the early years of the Soviet regime, Lenin and his colleagues were not unmindful of the need for ' revolutionary socialist legality ', in the sense that Soviet officials had to act in accordance with Soviet rules. However, in a period in which the small trader and the individual peasant farmer had to be painfully liquidated, the situation required administrative flexibility of a kind which did not take kindly to legal restraints. By 1935, however, these processes were complete. The State really did fully control the economic life of the U.S.S.R., and Stalin declared that the Socialist society had been built. No ' exploiting classes ' remained.

Clearly, the new and widespread tasks of the Soviet State, especially in the field of economic planning, required effective organisation, effective obedience to the State authorities. Furthermore, a new degree of *social* stability (reflected by increased income differentiation, inheritance laws, life insurance policies, the greater stress on family life, and so on) had to find its reflection in the legal structure of the Union. ' Stalin teaches us to strengthen Socialist legality, underlining all the importance to our further progress of the stability of Soviet laws. This idea of stability finds its reflection in the great Stalin constitution. . . .' [11]

This concept of the Soviet State is clearly quite at variance with the idea that it is about to wither away. Stalin himself was responsible for a reformulation of the official theory. ' The withering away of the State will come not through the weakening of the power of the State, but through its uttermost strengthening, which is necessary for the purpose of completing the destruction of the remnants of the dying classes and to organise defence against the capitalist environment.' [12] Only when people are willing to work without compulsion, drawing from the common pool in accordance with their needs, only when the capitalist States no longer threaten the security of the Union, will it be possible to think of the withering away of the State. These vast changes in the human character and the international situation cannot occur

[10] This view of Pashukanis and his school is fully developed in Vyshinski, pp. 58–61.
[11] Vyshinski, p. 54.
[12] Stalin, *Leninism* (*Voprosy Leninisma*, Xth Russian ed., p. 509).

for a great many years, and meanwhile the U.S.S.R. ' must proceed not by lessening the class struggle but by strengthening it '.[13]

At the XVIIIth congress of the Communist Party in 1939, Stalin formulated the tasks of the Soviet State as follows : ' defence of the country against external aggression, protection of socialist property, economic-organisational and cultural development work ', contrasting these functions with the task of liquidating hostile classes which played so large a role in Soviet affairs before 1936.[14] On this interpretation, the coercive measures taken within the U.S.S.R. in the period following the promulgation of the Stalin Constitution were part of the ' defence of the country against external aggression '; this accords with the official representation of all political opponents of the regime as agents of various foreign Powers.

This is what Vyshinski's textbook has to say about the nature of the Constitution : ' The dictatorship of the proletariat solves the problem of the proletarian revolution also with the help of law and in accordance with measures strictly defined by law, through administrative and judicial organs. The dictatorship of the proletariat is a power unlimited by any law. But the dictatorship of the proletariat, creating its own laws, uses laws, demands the observances of law and punishes breach of law. It does not entail anarchy or disorder; on the contrary, it entails strict order and firm government, acting on strict basic rules, set out in the fundamental law of the proletarian State, the Constitution. The problem of strengthening the power of the proletarian dictatorship faces the Soviet State in all its acuteness and strength. . . . The greatest expression of proletarian democracy, and at the same time the organic synthesis of the principles of proletarian dictatorship, is the Stalin Constitution '.[15] Denisov echoes him, quoting Stalin's dictum : ' The present Constitution leaves in being the dictatorship of the working class '.[16]

While the Soviet State axiomatically represents ' the highest form of democracy that is possible ',[17] all bourgeois States, whatever the party in power, inevitably act according to ' the juridical principles of the dictatorship of the bourgeoisie '.[18] (The English lawyer would be amused to see in Vyshinski's volume how easily English constitutional theories can be exploded. For instance, a quotation from Engels about the class prejudice of English country J.P.'s in 1875 is held to prove the utter hypocrisy of the whole contention that there is an independent judiciary in Great Britain !)

Soviet theorists make much of the democratic forms of the Stalin

[13] Stalin, *op. cit.*
[14] Summary quoted from *Soviet Administrative Law*, p. 1; full version in stenographic account of XVIIIth congress of C.P. p. 717.
[15] Vyshinski, pp. 50–51.
[16] Stalin, *Voprosy Leninisma*, 11th Russian ed., p. 519.
[17] Vyshinski, p. 51.
[18] Levin and Karass, p. 89.

Constitution. This form, as we shall see, does not correspond in its content to Western democratic ideas. However, it does not in the least follow that the Constitution is therefore a mere sham. It has a significant part to play in Soviet life, and so have the institutions it has called into being.

The reader who is unfamiliar with the Soviet Constitution may find some value in the following very condensed summary : a part (Articles 1–10) of the Constitution contains a series of sociological propositions which do not directly enter a lawyer's purview (*e.g.*, ' the U.S.S.R. is a Socialist State of workers and peasants ', or ' from each according to his ability, to each according to his work '). There is a section on basic rights and freedoms, to which allusion will be made later. Finally, there is a detailed account of the system of governmental organisation. This is based on an elected assembly, the Supreme Soviet, which is divided into two houses, the Soviet of the Union (elected in proportion to the population by electoral districts throughout the Union) and the Soviet of Nationalities, in which the sixteen Republics comprising the Union are represented equally, regardless of population, by twenty-five members each.[19] The two Houses meet normally for two sittings a year, each lasting less than one week. In between sessions, power is exercised by a joint standing committee of the two Houses, the Praesidium, subject to the ratification of important decisions by the Supreme Soviet. The Council of Ministers (formerly People's Commissars) is elected by the Supreme Soviet and is responsible to it and to the Praesidium. The general supervision over the administration of law (and the legality of administration) falls to the Attorney-General of the Union (' Generalni Prokuror '), who is appointed by the Supreme Soviet. The U.S.S.R. itself is, in law, a voluntary union of national republics, each with a constitution of its own. Finally, the interpretation of the constitution and of the laws is the responsibility of the Praesidium.

While there cannot be attempted in these few pages a detailed description of the Soviet system of government, it is of considerable interest to examine some individual features of the system outlined above, and to examine critically how Soviet theory and Soviet practice deal with the traditional problems which face the constitutional lawyer : Constitutional amendments, Sovereignty, Federalism, Separation of Powers, Legislation and its enforcement, and so on.

2. *Constitutional Amendment.*

A relative inflexibility of the Constitution is formally recognised by the requirement, in art. 146, of a two-thirds majority vote of both Houses for any amendment or new article.

This provision has not been of real importance for two reasons : the first is the fact, to be referred to later, that all voting in both

[19] There is also special representation for ' autonomous republics ' and for minor national subdivisions; these are themselves federal units of individual republics.

Houses is always unanimous. The second lies in the fact that the Praesidium has, by decree, several times amended the Constitution, and the amendment *took effect* before its subsequent ratification. Thus numerous new Ministries were set up by Decree ('Ukaz') of the Praesidium (*e.g.*, the Ministry of Rubber Industry on June 5, 1941, Ministry of Machine Tool Construction on October 14, 1945). As the setting up of Ministries affects the powers of the Republics of the Union, all Ministries are listed in Articles 77 and 78 of the Constitution; yet it was not until March, 1946, that the requisite amendments were put before the Supreme Soviet, and were carried unanimously and without discussion.[20] Meanwhile the relevant Ministries had been functioning in their new form on the authority of the Praesidium. Another example among many may be cited: on the submission of the Supreme Soviet's Committee on New Legislation, the Praesidium promulgated on October 10, 1945 an 'Ukaz' changing the minimum age at which a deputy could be elected to the Supreme Soviet from eighteen to twenty-three, thus amending art. 135 of the Constitution. The wisdom of the measure is not in question, but it is interesting to note that the elections of 1946 were carried out with this 'Ukaz' in effective operation, and it was the newly-elected Supreme Soviet which ratified the change, ex post factum, unanimously and without discussion.[21] It is not unfair to conclude that formal constitutional rigidities have little chance of interfering with administrative expediency. Formally, only the Supreme Soviet can make laws; the Praesidium can only issue 'Ukazes', which must be based on powers conferred by the Constitution or on existing legislation. It is clear from the above that in actual fact its Ukazes can not only have the force of law but can also effectively amend the Constitution; formally, however, it is not till a vote of the Supreme Soviet is taken that the Ukaz becomes a Law ('Zakon').

Even the Council of Ministers has been known to ignore the Constitution. For instance, Article 121 of the 1936 Constitution guaranteed free secondary and higher education. In 1940 a ministerial order introduced fees. Article 121 was amended by the Supreme Soviet . . . in 1947.

3. *Sovereignty and the Union Republics.*

The official teaching on Sovereignty is closely linked with the federal nature of the Soviet State, and it is convenient to treat both together. (For reasons of space the important subject of the 'autonomous republics', *i.e.*, federal subdivisions of the Union republics into which the U.S.S.R. is divided, is being left on one side.)

[20] See *Stenographic Account of the first session of the Supreme Soviet*, Moscow, 1946.
[21] *Op. cit.*

Sovereignty is defined as follows in Vyshinski's textbook: 'the supremacy of State power, which makes it unlimited and independent within its own borders and independent in its relationship with other States'.[22] Granted this definition, it must be said that Soviet theory advances a series of propositions which no lawyer outside its own borders would regard as mutually compatible. Thus: 'In the U.S.S.R. Sovereignty belongs to the multinational Soviet people, who exercise it through its socialist State and through the supreme organs of State power',[23] and again: 'the supreme organs of State power in the U.S.S.R. . . . incarnating the will of the whole multinational Soviet people, fully and indivisibly exercise its sovereignty'.[24] But at the same time 'every Union republic is a sovereign State',[25] 'the Stalin Constitution confirmed . . . the sovereignty of the Union Republics',[26] 'the Sovereignty of the U.S.S.R. does not contradict the sovereignty of the Union Republics'.[27]

What reasons are given for this apparently untenable proposition? First, that the U.S.S.R. was formed on the basis of voluntary union, in which the union republics voluntarily surrendered certain powers to the central U.S.S.R. government. Secondly, that each republic has the formal right of secession from the Union (art. 17). Thirdly, that the boundaries of each republic cannot be altered save with its consent. Fourthly, that each union republic possesses all residuary powers, *i.e.*, those not specifically granted to the centre in art. 14 of the Constitution. Fifthly, that the republics participate in central decisions by sending their representatives to the Supreme Soviet, and in particular to the Soviet of Nationalities within it, and these decisions are (by definition!) in the general interest of all. Sixthly, each republic has the right to enter into relations with foreign States and to maintain its own military formations. Finally, that without the protection of the Union, the republics would not be able to defend their own sovereignty. 'Bourgeois' teaching on the subject is false because: sovereignty never belongs to the people in reality, but only to the ruling class; and any but the largest States are not independent except in an unreal, formal sense.

The views of Vyshinski and his fellow-lawyers, summarised above, are not in accord with Soviet reality. Vyshinski is fond of judging 'bourgeois' institutions by their real nature-in-action, as distinct from their formal-juridical nature, and it is only right to return the compliment by subjecting the 'sovereignty' of the Union republics, two of which have separate representation within UNO, to a brief factual scrutiny:—

[22] Vyshinski, p. 262.
[23] *Ibid.*
[24] *Ibid.*, p. 292.
[25] *Ibid.*, p. 263.
[26] Levin and Karass, p. 130.
[27] N. P. Farberov, *op. cit.*, p. 12.

It is necessary to begin with a reference to two concepts: ' democratic centralism ' and ' dual subordination ', an understanding of which is essential in this context.

The term ' *democratic centralism* ' was originally coined to describe the form of organisation which Lenin prescribed for the Bolshevik party: iron discipline and full obedience to the elected leadership. This system was also applied to the Soviet State: ' Democratic centralism assumes, in the structure and in the activity of the State machine, unity in essentials and variety in detail. . . . The necessity of unity is founded on common basic interests of all nationalities and administrative units of the Soviet State and of the State as a whole '.[28] Or, put another way, the system implies ' the strictest obedience to the directives of the Party and the government ', while ensuring ' fullest consideration of local conditions and peculiarities '.[29]

The above principles find their organisational expression in the so-called system of ' *dual subordination* '. At each level below that of the central government, one often finds State organs nominally responsible to two masters: one on its own level, and one above it. For example, the Council of Ministers of the Ukrainian republic is responsible *both* to the Council of Ministers of the U.S.S.R. *and* to the Supreme Soviet of the Ukraine; the Ukrainian Minister of Textile Industry is at one and the same time the Ukrainian subordinate of the Minister of Textile Industry of the U.S.S.R. *and* a member of the Ukrainian ' cabinet '; the Kiev city health department is also the Kiev branch of the Ukrainian Ministry of Health, and so forth. Within this system, the orders of the centre have all the legal force of a valid instruction from a hierarchical superior. From top to bottom, ' the Soviet on a higher (hierarchical) level controls the inferior one, and the instructions of the higher Soviet are obligatory on the lower one; the former checks on the legality of the latter's actions, and is responsible for these actions '.[30] The same degree of subordination applies to any administrative unit of the Union republics vis-à-vis its equivalent in Moscow. The fact that a republican minister, for instance, is responsible to the Cabinet of which he is a part, as well as to his superior on U.S.S.R. level, must be viewed in the light of the fact that the Ukrainian cabinet collectively is fully subordinated to the U.S.S.R. cabinet.

It is with the above points in mind that one can appreciate the significance of the ' residuary ' nature of the powers of the republics, *i.e.*, their right to do anything not specifically assigned to the centre by virtue of art. 14 of the Constitution. It must be added that art. 14 defines the competence of the Union so vaguely that anything could be included within its orbit, and that in case

[28] Denisov, p. 260.
[29] *Administrative Law*, p. 17.
[30] Denisov, p. 261.

of dispute the Praesidium is the sole arbiter of the Union's competence (there has, needless to say, been no dispute to date).

A brief mention of points relevant to the powers of the union republics will now be given below:—

(a) We have already seen how far the Councils of Ministers which each republic possesses are under the authority of the centre. With a few exceptions of purely local significance, the individual ministries on republican level are branches of ministries in Moscow (these ministries are known as 'union-republican'), operating under the principle of dual subordination. In these cases, the ministry at Union level 'exercises its authority through identically-named ministries at union-republican level'.[31] The degree of autonomy actually delegated by the centre must vary considerably, but, for example, an economic ministry on republican level receives instructions from Moscow on 'the organisation of work, piecework norms, wages, financial organisation and so on, the construction of new undertakings, the organisation of raw material supplies, preparation of cadres, and so forth', and the ministry's budget and production plans require central approval.[32] It should be added that large industrial units of all-Union significance are controlled directly from Moscow.

(b) Even this limited degree of local autonomy applies to a small section of the Soviet State's activity, particularly in the economic field. Of the fifty economic ministries which existed in Moscow at the end of 1947, only fifteen were union-republican. The remaining thirty-five are known as 'union ministries', *i.e.*, ministries which conduct their affairs within the republics through subordinates who are responsible *only* to the centre.

(c) Since 1944, some of the republics possess their own ministries of Foreign Affairs. Under the amended Constitution, 'Foreign Affairs' is on the list of union-republican ministries, and the normal principle of hierarchical subordination to the centre, which is a normal feature of a union-republican ministry, must apply to this field. The textbook lays down that the centre remains responsible for 'the general rules concerning the relations of the individual union republics with foreign countries' and 'for representing the Union as a whole in international relations'.[33] It is difficult indeed to think of any subject which, say, the Ukraine could discuss with a foreign country without in some way affecting the Union as a whole — and therefore necessarily requiring the guidance of Moscow. 'It is natural that the decisive rights in this field belong to the Union'.[34]

(d) There is a Ministry of the Interior in each of the republics, but these are fully subordinate to the Minister in Moscow, having

[31] *Administrative Law*, p. 27.
[32] *Ibid.*, p. 294.
[33] *Ibid.*, p. 171.
[34] Levin and Karass., p. 137.

no responsibility whatever to the republican council of ministers. 'In this respect the Ministry of the Interior is in the same position as a Union ministry'.[35] The individual republics therefore have no control over the secret police formations, labour camps, convoy troops, frontier guards and even fire brigades functioning on their territories.

(e) The 'sovereign' republics are forbidden to alter their own administrative-territorial divisions, which are listed in arts. 22–29 of the *Union* Constitution.

(f) The budgets of the republics require approval by the centre. (In 1946 all the sixteen republics' budgets combined totalled 63,000 million roubles, while the Union's budget was 320,000 million roubles.)

(g) The union-republics have, since 1944, the right to maintain their own armed forces. This is, on paper, an impressive manifestation of sovereignty. However, this is how the right is interpreted by a Soviet commentator: 'The unity of the Army is now being still further strengthened, as the military formations of the union-republics will be component parts of the Army of the U.S.S.R. The Army of the Soviet Union must continue to be unquestionably one, unquestionably centralised. The whole Red Army will have a single set of regulations, a single mobilisation plan, a single command. The basic rules of organisation of the armed forces will be laid down by the Union organs'.[36]

(h) The supervision over the legality of administration within each republic's territory is carried out by the 'Prokuror's' department. However, the officials of this department are appointed by, and are responsible to, the 'Prokuror-General' of the U.S.S.R., and they are *not* in any way responsible to the republican authorities. The Prokuror is barred from challenging any acts of the *Central* Government.

(i) 'The Council of Ministers of the Union republics are forbidden to undertake any reorganisation of their administrative apparatus, to create new organisations or offices, or to alter the nomenclature or salaries of their officials, without the permission of the Central Establishments Commission' (in Moscow).[37]

(j) Most important of all, the Communist Party is highly centralised on an all-Union basis, and in a one-party State it is the degree of autonomy granted to local party functionaries which really determines the extent of local rights. The party statutes lay down that 'on all questions, party groups are obliged strictly and undeviatingly to obey the decisions of the leading organs of the

[35] *Administrative Law*, p. 192. Presumably this applies equally to the Ministry of State Security, formerly part of the Ministry of the Interior.

[36] N. P. Farberov: *The Sovereignty of the Union Republics*, transcript of lecture, published by *Pravda*, Moscow, 1946.

[37] *Administrative Law*, p. 40 (even a rural district council in England has greater powers in this field!).

Party' (paragraph 71) and this applies to the party leadership of a Union republic vis-à-vis the centre.

There remains the formal right of secession from the Union. When the new Constitution was being discussed in 1936, Stalin said: 'The U.S.S.R. is a voluntary Union of republics with equal rights. To omit from the Constitution the articles relating to freedom to secede from the U.S.S.R. would be a breach of the voluntary character of the Union'.[38] It is certainly a tenable proposition to say that the republics have *equal* rights (whatever views one may hold as to the extent of these rights), but the right to secede is purely fictional, and must remain so for as long as public advocacy of secession remains a *de facto* criminal offence. No one with the slightest knowledge of U.S.S.R. politics would deny that if any Ukrainian (for instance) stood up in a meeting in Kiev to advocate independence for the Ukraine, he would court instant arrest. Indeed, Stalin himself has written the following revealing paragraph: 'There are occasions when the right of self-determination contradicts another and higher right, the right of the working class to strengthen its power. In these cases—it should be frankly stated—the right of self-determination cannot and must not obstruct the rights of the dictatorship of the working class. The former must give way before the latter'.[39]

Soviet federalism rests on the need to adjust the policies decided at the centre to the varied national cultural and linguistic requirements of a vast country. 'The toiling masses of each nation within the U.S.S.R. are free in deciding the national form of their participation in the common work of building Socialism'.[40] Considerable local initiative in carrying out centrally-devised policies is encouraged, but strictly within the framework of these policies.

Soviet delegates at international conferences defend the principle of national sovereignty. It should be clear from the above that in Soviet parlance the Ukraine or Azerbaidjan are sovereign States. So long as Western lawyers judge Soviet lawyers' pronouncements at their *Western* linguistic value, they will be unable to follow their case.

4. *The Communist Party and the Constitution.*

The position of the Communist Party in the Soviet State is the subject of much misunderstanding. The Webbs defined it as follows: 'The party members who are office-bearers, and who are all pledged to complete obedience to the dictates of the Party authorities, have assumed as their main vocation the supreme direction of policy and the most important part of its execution, in every branch of public administration of the U.S.S.R. . . . The Communist party central committee, and especially the inner Polit-

[38] *Report on the draft Constitution of the U.S.S.R.*, Moscow, 1936.
[39] Stalin: *Marxism and the National-Colonial Question*, quoted by Denisov, p. 232.
[40] Vyshinski, p. 218.

bureau which it appoints, not only prescribes the line to be pursued by all party cells throughout the U.S.S.R., but also co-ordinates and directs the policy and executive action of the Council of People's Commissars and of all party members who constitute the most important part of the staffs in these commissariats. It is in this way, in fact, that is exercised the dictatorship of the proletariat '.[41]

The Webbs wrote before the Stalin Constitution came into force. There is no doubt, however, that the above passage in no way underrates the role of the Party. Denisov's textbook, after comparing the Party with the heroes of Greek mythology, states the following: ' Party leadership is the basis of the fruitful activity of each State and social organisation, and of all these organisations taken together. They all take instructions from the Party, which has its members in the State and social organisations of the masses, forming the directing nucleus and ensuring that the given State or social organisation carries out the decisions of the Party. That is why the opportunist " theory " that non-party organisations should be independent of the Party organisation, has been shown up by Lenin and Stalin as incorrect and harmful. . . . In general, the whole Soviet system and constitution rests on the directing role of the Party. . . . The Party controls the selection, distribution and training of the personnel of the whole Soviet State apparatus, and checks on the work of the organs of State and government. Not a single important decision is taken by the State organs of our country without previous instructions and advice from the Party '.[42] The Communist Party is specifically mentioned in art. 126 of the Constitution, in which the following clear statement of its functions occurs: ' The most active and conscious citizens from the ranks of the working class and other toilers join together in the All-Union Communist Party (Bolsheviks), which is the advance guard of the toilers in their struggle for the strengthening and development of the Socialist order and *constitutes the directing nucleus of all toilers' organisations, both social and governmental* '. Particular attention must be drawn to the last sentence (emphasis mine), because in it is to be found the key to all Soviet constitutional practice and the explanation of much of the theory. The leading role of the Party permeates all Soviet life. ' The unity of the administration is ensured by the political leadership of the Party, whose directives and slogans *have the force of a practical decision which must be immediately carried out*; the executive organs carry out their functions in full accordance with the directives given by the Party '.[43] A large proportion of the more important executive orders are published as coming jointly from the Council of Ministers and the Central Committee of the Party.

The Soviet theorists are, of course, right when they point out

[41] *Soviet Communism*, p. 354.
[42] Denisov, p. 191–2.
[43] *Administrative Law*, p. 6.

that their Constitution at least honestly emphasises the supremacy of the Party, while Western constitutions usually ignore the existence of parties, although these are by no means without significance to the real working of any ' bourgeois ' constitution. But the existence of a highly-disciplined party with a long-term political monopoly creates a quite special situation, and, as we have seen, there is a profound sense in which a pronouncement of the Central Committee of the Party has practically the force of law, despite the oft-repeated desire of the Party leaders to carry out the task of government exclusively through the Soviet State machinery.

The Party itself, like the Soviet State itself, is run on the basis of ' democratic centralism ', *i.e.*, unquestioning obedience to orders from superior authority, which, however, is itself elected. There are some who hold that such a system gives to the Party chiefs powers over the process of election itself, and certainly the higher organs of the Party seem to be endowed with powers which one cannot see effectively challenged from below. It should be stated in this connection that while the Party statutes lay down that a Congress should be held every three years, no Congress has been held since 1939.

5. *The Constitutional Guarantees.*

The freedoms guaranteed by the Constitution must be interpreted, and are interpreted by Soviet jurists, in the light of the nature and purpose of the Soviet State. Personal freedom, in the sense of freedom from want, is ' guaranteed ' by the provisions relating to old age pensions, sick pay, freedom from unemployment, etc.[44] When it comes to such matters as freedom of the Press, of meetings, demonstrations, or of speech, art. 126 of the Constitution makes these freedoms conditional upon their being used ' in accordance with the interests of the toilers and with the aim of strengthening the Socialist order '. Explaining these provisions, the textbook lays down : ' In our State there is not, and of course cannot be, any freedom of speech, of the Press, etc., for the enemies of Socialism '. As for demonstrations, ' in the U.S.S.R. the fullest initiative is granted to social and toilers' organisations, and in the first place to the directing nucleus of all these social and governmental organisations, the Communist Party '.[45]

The Soviet jurist does not consider that these limitations in any way contradict his concept of democracy; he considers that the capitalist basis of the Western States makes nonsense of their formal constitutional guarantees, and that only in the U.S.S.R. (and the countries of the ' new democracy ' in Eastern Europe) is there to be found the material basis of real freedom, directed in the interests of the mass of the people.

[44] But we have seen how one ' guarantee ', dealing with free higher education, was disregarded in 1940.

[45] Vyshinski, p. 555.

However, it is difficult to see how Vyshinski would justify the immense precautions taken to make sure that unorthodox views do not find their way into print. The following quotation tells its own story: 'Permits for obtaining and using duplicators and accessories thereto are granted by the local police department to the *head of the secret department* within the undertaking, office or organisation acquiring the duplicator,[46] or, where there is no secret department to the head of the undertaking, office or organisation. . . .' Once the permit is received, 'the duplicator must be registered in the local office of "Glavlit[47]"', and 'the sale of duplicators is permitted only with prior permission of the police department, while accessories may only be obtained on production of the duplicator's registration certificate, bearing a wax seal of the police department'.[48]

6. *The Separation of Powers.*

Soviet theorists strongly attack the theory of separation. 'The basic content of the principle of the separation of powers in a bourgeois State consists of ensuring the independence of the executive, as the firmest prop of the power of the bourgeoisie, as against the elected representatives of the people, who at a time of wider franchise are less reliable from the point of view of bourgeois interests'.[49] In Vyshinski's textbook, both Ramsay Muir's and Lord Hewart's criticisms of the growth of delegated legislation are quoted with approval.

Soviet theory insists on 'the supremacy of the elected representative assembly in the Soviet State'.[50] The Supreme Soviet, or its standing committee (the Praesidium) has supreme powers. 'All other activities of the State are subordinate in character. Forms of subordinate powers are: the executive . . . the judiciary'.[51] In accordance with these principles, the Ministers are appointed by, and are responsible to, the Supreme Soviet, while the Praesidium interprets the Constitution and the laws; the judges of the High Court and the Prokuror-General of the U.S.S.R. are also appointed by the Supreme Soviet.

The declared opposition of Soviet theorists to the principle of separating the powers arises, too, from the theoretical consideration that there is no need to protect different sections of the community against the State, or one part of the State against another. Such

[46] Emphasis mine. No *individual* is entitled to acquire a duplicator. The 'secret department' is the network of secret police agents which functions within most Soviet institutions. It is rare to find a reference to it in print.

[47] 'Glavlit' is the body responsible for censorship of all published material, which must be submitted to it *before and after* its appearance.

[48] *Administrative Law*, p. 231. This is NOT a wartime security measure, as it already existed in 1935.

[49] Levin and Karass, p. 94.

[50] Levin: *The State system of a Socialist Democracy* (transcript of lecture), Moscow, 1946.

[51] Levin and Karass, p. 34.

an idea would run counter to the present-day Soviet notion that Soviet society contains no internal contradictions. Indeed, the Soviet State is held literally to *embody the General will* in Rousseau's sense [52]; it must therefore be illimitable.

7. *The Supreme Soviet and its Praesidium.*

The Supreme Soviet requires a long article of its own. All that will be attempted here is a brief discussion of three aspects of its existence: its unanimity, the theory behind its second chamber, and its Praesidium.

It has already been stated that it is, in law, the sole body entitled to legislate for the whole Union.[53] This was not true of its predecessor under the 1924 constitution, the Congress of Soviets. This body, indirectly elected, met every two years, and was more like a mass meeting than a legislature (about 3,000 delegates attended). It elected a Central Executive Committee ('Vtsik') of some 600 members, which met at more frequent intervals and exercised all the Congress's powers. When 'Vtsik' was not in session, all its powers (including that of legislation) were exercised by its praesidium. Finally, the Council of People's Commissars was also empowered to pass valid laws.[54]

Although the Supreme Soviet is now of manageable size and not just a mass meeting, the Western observer cannot but be struck by its unanimity on *all* issues, including the election of its own officers and committees. This unanimity does not mean that there is no criticism. Reports of sessions are full of speeches calling for more and better construction projects in a given area, or demanding greater efficiency in various branches of the administration. These criticisms, however, are never taken to the point of registering a hostile vote (unless, of course, that vote is itself unanimous). Criticism concentrates on details of execution, but not on the policy itself.

Soviet theorists maintain that the Supreme Soviet is 'a working institution, which does not spend time and energy on political quarrels and arguments . . . in its activity is expressed moral-political unity, a bolshevik business-like approach'.[55]

In fact, the practice of unanimity arises naturally from the one-party system. The large majority of deputies are party members, and the others may be fairly described as fellow-travellers. In consequence, any disagreements are ironed out behind closed doors in meetings of the party group, and no doubt nominations to

[52] This analogy is developed at some length in an unsigned leading article in *Soviet State and Law*, 1946, No. 2.

[53] Art. 32; but the Praesidium and the Ministers have invaded this field (see above).

[54] The Webbs' *Soviet Communism*, or Batsell's *Soviet Rule in Russia* (Macmillan, N.Y., 1929), contain full descriptions of the pre-1936 system, seen from very different angles.

[55] *Soviet State and Law*, 1946, No. 2, p. 28.

committees, etc., are similarly arranged, for only one name is generally put forward for any one vacancy.

Needless to say, Party control over the legislature is by no means peculiar to the Soviet Union! What *is* unique is the pursuit of the fetish of unanimity, even where (in the election of a minor committee for example) it has no clear purpose. It might well have been argued that only under a socialist State could deputies cast their vote quite freely, unencumbered by vested interest or narrow party considerations. This is not, however, the line taken in the U.S.S.R., where the 'sure compass' of dialectical materialism is held to provide one, 'correct', answer to any problem, and where the Party controls all important appointments.

The 'Second Chamber' of the Supreme Soviet, the Soviet of Nationalities, is composed of twenty-five representatives directly elected by the people of each of the Union republics, plus eleven from each autonomous republic, and lesser numbers from smaller national groupings. This represents in the highest organ of Soviet power the multinational principle of the Soviet State, and is intended to safeguard the specifically national interests of the various national groupings. Originating in a committee within the People's Commissariat of Nationalities, the Soviet of Nationalities was set up under the 1924 Constitution as a special section of the Central Executive Committee (Vtsik). The Soviet of Nationalities under the Stalin Constitution is fully the equal in all formal respects with the Soviet of the Union. At joint sessions the Speakers of the two Houses take the chair at alternate meetings. Deputies are elected to both Houses for four years, at the same general election. In case of disagreement between the two Houses, a joint committee (on which they are equally represented) is provided for in the Constitution; if, after all efforts by this committee the Houses still disagree, the Praesidium dissolves them and there is a new election. For no reason other than the above can the Supreme Soviet be dissolved before the end of its term. In practice, this provision is without significance, as both Houses have always been unanimously of the same opinion on any issue.

The *Praesidium* is, perhaps, the most original contribution to the U.S.S.R. to the practice of government.[56] It is composed of a chairman, sixteen vice-chairmen (one for every union republic), fifteen other members and a secretary, all elected at a joint session of the two Houses of the Supreme Soviet (art. 48). Its powers are:—

(a) Legislative: although it has the formal right only to issue Decrees (Ukazes), we have seen that in effect the Praesidium may legislate effectively by Ukaz on any issue, and may expect its acts to be subsequently ratified by the Supreme Soviet. (In any

[56] The 'new democracies' in the Balkans have adopted some features of this institution.

case, being itself the interpreter of the Constitution, it is hardly likely to find itself guilty of illegal acts.)

(b) Executive: The Praesidium's functions under this head cover a field which, in most other countries, belongs either to the Cabinet or to the Head of the State. Thus it calls meetings of the Supreme Soviet, appoints and accepts resignations of Ministers (between sessions of the Supreme Soviet), declares war, appoints ambassadors, receives letters of credence from foreign envoys, exercises the prerogative of mercy, awards decorations, appoints and dismisses C.-in-C.s of the armed forces. Vyshinski stresses that the Chairman of the Praesidium has no powers, except those arising simply from his being the chairman; he takes the chair, he signs laws and ukazes, but he can issue no instructions save in the name of the Praesidium. 'The Praesidium of the Supreme Soviet is the "President-in-Commission" ("kollegialny president") of the U.S.S.R.'.[57]

(c) Judicial: The Praesidium interprets the Constitution and the laws and has the power of declaring any act of the Union Ministry, or republican ministries, or any other administrative act, void if it deems them not to be in accordance with law.

The Praesidium is 'accountable to the Supreme Soviet for all its activities'.[58] The Praesidium has no right of veto over legislation, and cannot dissolve the Supreme Soviet save if the two Houses fail to agree. In practice, with the Supreme Soviet meeting at infrequent intervals, the Praesidium naturally has very wide powers, which it exercises without any instance of challenge or even question from its 'master', the Supreme Soviet.

A member of the Praesidium who becomes a minister resigns from the Praesidium, but ministers can be deputies to the Supreme Soviet, though this is not always the case.[59]

8. *The Executive.*

The *Council of Ministers* is responsible to, and is appointed by, the Supreme Soviet and its Praesidium, and its instructions must be based on either laws or ukazes issued by these bodies (arts. 66–67).[60] These instructions ('postanovlenia'—laying down norms, and 'rasporyazhennia'—deciding a specific case) have the force of a statutory rule. There has been no case of a rule being challenged, but presumably such a challenge would have to go up for decision to the Praesidium. In practice the Council of Ministers must work

[57] Vyshinski, p. 311. The words are Stalin's.
[58] *Ibid.*, p. 310.
[59] In 1938 Stalin himself was a member of the Praesidium, but he ceased to be a member when he became officially the Head of the Government. He remains a deputy, however. Ministers, whether they are or are not deputies, have the right to speak in either House.
[60] In practice the Council of Ministers, usually bracketed with the Central Committee of the Party, has issued Orders making new laws, and even (as we have seen) amending the Constitution.

closely with the Praesidium, as is inevitable in view of the wide powers of the latter.

Space forbids detailed inquiry into the powers of Ministers. Attention ought, however, to be drawn to the very large size of the Council of Ministers (nearly seventy strong). So large a body cannot attempt serious discussions on policy. Its real nature becomes apparent when the list of ministries is studied (Ministry for the Cinema, Ministry for Manufacture of Transport Equipment, Ministry for the Oilfields of the Eastern regions, Ministry of Cellulose and Paper Manufacture, to cite some examples). The bulk of rank-and-file ministers deal with economic sectors, within which they are in effect the senior managers. Their task is to issue orders to the industries they control in accordance with policy, and it is to a much smaller body that one must look to discover who makes policy. It is surely no accident that under the Chairman (Stalin) there are eleven vice-chairmen of the Council of Ministers, who are all members or alternates of the powerful Political Bureau of the Communist Party. They must surely double the roles of Party and State leadership, and act as an inner Cabinet. Whereas in 1937 there were two vice-chairmen and eighteen ministers, there are now eleven vice-chairmen and sixty ministers, so it is reasonable to suppose that these vice-chairmen control groups of ministries. Some of them, like Molotov and Mikoyan, hold ministerial posts, while others (*e.g.*, Malenkov, Andreyev) are without portfolio.

The Council of Ministers has attached to it a number of special Boards and Committees with wide powers (for instance those dealing with afforestation, radio transmission, religious affairs, as well as the Academy of Sciences and the Tass news agency. All are under the general authority of the Council of Ministers, and their chiefs have the right of ' consultative voice ' without a seat in the Cabinet.

In the composition of individual ministries one peculiarity is worth bringing out: in every ministry there is, under the Minister, a council (' kollegia '), to whom all important questions must be referred; this council is appointed not by the Minister but by the Council of Ministers. Its members consist of the Minister's deputies and of some high civil servants, and, if they disagree with the Minister, they have the right to appeal to the Council of Ministers. Indeed, before 1934 the ' kollegii ' issued instructions on their own responsibility; this caused confusion, and they were abolished, only to be revived in 1938 without the power of independent executive action. Only the Minister can issue a valid instruction for the Ministry as a whole.

One ministry is peculiar to the Soviet Union and deserves a brief special mention. This is the Ministry of State Control, born of a marriage between the Workers' and Peasants' Inspection and the Party's Central Control Committee. This Ministry has the double task of preventing abuses in the administrative machine,

and of ensuring that orders given by the higher authorities are in fact carried out. Its officials have powers of access to all relevant documents, and 'it is compulsory for all ministries, commissions, departments and other organs' to provide 'explanations, reports and all other information'.[61] The Ministry has its men working throughout the administrative machine, at all levels (it even has its inspectors in military stores and army divisions). The Ministry's officials are empowered to take disciplinary action against offenders, or, in serious cases, to hand the case over to the Prokuror for criminal prosecution before the courts. The Ministry of State Control plays an important role in that system of inspection and cross-checking, which is a feature of Soviet administration (other 'checkers' include the secret police, the Ministry of Finance, the Planning authorities and the Establishments commission).

9. *Electoral Procedure.*

The procedure for *elections* to the Supreme Soviet is, on paper, fully consonant with the democratic principle. The legality of election procedure is watched over by a system of electoral commissions, who represent social societies and workers' organisations (the names of members are confirmed by the local Soviet in the area in which they function). A widely representative Central Electoral Commission, whose members are confirmed by the Supreme Soviet or its Praesidium, supervises the elections on a nation-wide scale, and hears appeals against any decision by the local commissions. It renders a report on the conduct of the elections to the Mandates commissions of the two Houses of the Supreme Soviet.

Candidates may be nominated by 'social organisations or societies of toilers—*i.e.*, communist party organisations and other societies registered in accordance with the law'.[62] Religious organisations are excluded.[63]

Now it has already been remarked that the Constitution itself lays down that the Communist party is 'the directing nucleus of all social organisations and societies of toilers'. It follows, then, that the candidate is effectively selected by the Communist Party (whether that candidate is himself a party member or not). In the two elections that have been held to the Supreme Soviet since the promulgation of the Stalin Constitution (1938 and 1946), there has not been a single case of a contested election. A Soviet lawyer would view the matter thus: 'The moral and political unity of the whole Soviet people results in the fact that, in practice, only one candidate is nominated in each constituency, and he receives unanimous support from all social organisations and meetings of the working masses of the given area. . . . Soviet elections are a brilliant demonstration of Socialist Democracy in action'.[64]

[61] *Administrative Law*, p. 128.
[62] Art. 56 of the *Regulations on elections to the Supreme Soviet of the U.S.S.R.*
[63] Vyshinski, p. 637.
[64] Levin and Karass, p. 215.

Indeed, at the last election 99.7 per cent. of the electors voted, and less than 1 per cent. failed to vote for the official candidates. As a charmingly naïve article put it, ' not a single deputy in a bourgeois parliament . . . can ever have received or can ever receive such a majority . . .'.[65] At any rate, we must admit that the organisation which gets people to the poll must be very efficient.

The Constitution provides for the recall of individual deputies by the electors if the latter are dissatisfied with them, but the mechanism for doing so has never been brought into being, and the right is purely theoretical to date.

10. *A Note on the Judiciary and the Political Police.*

The Soviet judicial system requires an article of its own, and only the briefest reference will be made to its position in the constitutional structure of the Union. At the top of the hierarchy of people's and regional courts stands the Supreme Court (strictly the High Court) of the U.S.S.R. It is divided into five ' collegia ' : civil, military, criminal, rail transport and water transport. There is a President, sixty-eight judges and twenty-eight ' assessors '. The collegia are responsible for hearing appeals from the lower courts, which may be initiated by an aggrieved party or by the prosecutor (Prokuror); in addition, there are cases of national importance, for which the relevant collegium of the High Court acts as a tribunal of first instance. On these occasions, two assessors sit with the judge (as is the practice in the lower courts). The Military collegium heard the cases of Zinoviev and Bukharin during the purges, because it covers ' cases of treason, espionage, sabotage, etc., by whomsoever committed ',[66] as well as appeals from courts martial. The Transport collegia hear appeals from the special transport courts, whose main task is to enforce labour discipline, and who appear to have powers similar to courts martial. The two transport and the military collegia are staffed by judges who have risen in the heirarchy of these special courts. From the decisions of the collegia there is no appeal (save to the Praesidium, which exercises the prerogative of mercy).

However, cases may be reviewed by the Plenum of the Supreme Court, which is a meeting of all the judges, attended also by the Prokuror-General and the Minister of Justice, held at least every two months. The Plenum reviews those judgments of the Collegia which are brought to its notice by the President of the Court or the Prokuror-General, and issues directives to the lower courts. These directives lay down the principles which the lower courts must follow in applying the laws, and frequently embody valuable safeguards for the public.[67]

[65] *Soviet State and Law*, 1946, No. 2. [66] Vyshinski, p. 471.
[67] Schlesinger, op. cit., contains much information on the general work of the Soviet courts.

The Supreme Court's powers to interpret laws arise primarily from its own case-work. In carrying out this function, however, it is subordinate to the Praesidium of the Supreme Soviet, which has the overriding right to interpret the Constitution and the laws.

The Supreme Court judges are appointed for five years by the Supreme Soviet, and article 112 of the Constitution lays it down that they are ' independent and subject only to the law '.

As in most other Continental countries, the preparation of a case against the accused (including interrogation of witnesses, etc.) is undertaken by a judicial investigator (' sledovatel ') who operates under the guidance of the Prokuror. For political cases, however, the organs of the Ministry of State Security (*i.e.*, the political police) act as judicial investigators, with the usual powers of interrogation and detention which such officials possess.

The Minister of Justice exercises a general supervision over the functioning of the courts. He may not intervene in the hearing of a case (save to overcome delays and red tape), but he ' watches over the correctness of the application of the laws to civil and criminal cases '.[68] If the Minister feels that a new instruction to the courts is called for, he puts a proposal to that effect before a meeting of the Plenum of the Supreme Court.

Space compels total omission of fascinating problems connected with procedure and application of the laws. But no review of Soviet constitutional practice can omit some reference to the Ministry of Home Affairs and the Ministry of State Security, usually known by their initials—M.V.D. (N.K.V.D.) and M.G.B. These two ministries were at one time one, and the exact boundary between their functions is a well-guarded secret. They jointly exercise the powers of the former O.G.P.U., and many more besides. There is nothing in the Constitution about the wide powers of arbitrary imprisonment practised by these ministries and their local organs. However, a series of laws and orders regulate their functions, and many pages of the textbook on Administrative Law are devoted to listing them. We have already seen that the M.V.D. and M.G.B. organs act as preliminary investigators of any political case. If they should come to the conclusion that a citizen is ' socially dangerous ', the ' Special Council ' (Osoboe Soveshchanie) may exile him or confine him to a concentration camp for up to five years—and ' control over the release of the detainee is exercised by the local organs of the M.V.D. in the area of exile or detention '.[69] The Special Council at Union level consists of the Minister of the Interior, his highest subordinates and the Prokuror-General; the latter may appeal to the Council of Ministers against an unjust detention order. But if the security organs have built up a case against the accused (for instance under the many sub-paragraphs of Article 58 of the Criminal Code, which define counter-

[68] Denisov, p. 314.
[69] *Administrative Law*, pp. 191 and 245.

revolutionary activities), he is tried and sentenced by the regular courts of the land. The choice seems to rest with the secret police, who undertake the preliminary examination.

The M.V.D. also exercises the functions of the Registrar-General, controls fire brigades, the uniformed police, a large and well-equipped Security Army, frontier guards, road-building, prisons and concentration-labour camps. With the M.G.B., it is a power in the land; during the great purge of 1936–8 it was able to cause the total disappearance of deputies, Ministers and even members of the Politbureau.

11. *The 'Prokuror'.*

The institution of *Prokuror* in the Soviet State has no clear parallel in Western countries. He is at one time the Public Prosecutor and the guardian over legality in the field of both administration and justice in the area in which he functions. The hierarchy of local Prokurors are appointed by, and are entirely subordinated to, the Prokuror-General of the U.S.S.R.; they are totally independent of the local or union-republican authority. The Prokuror-General is appointed by the Supreme Soviet for seven years, and we have seen that he plays his part in the plenums of the Supreme Court in determining the general 'policy' of the Soviet Courts. He also personally prosecutes in important cases before the Supreme Court; thus Vyshinski, who was then the Prokuror of the U.S.S.R., prosecuted Zinoviev, Bukharin, etc., before the military collegium of the Supreme Court.

The Prokuror in the localities exercises the following functions:

(a) While 'he does not settle administrative problems himself', the Prokuror 'must see that the settlement of such problems by local State authorities corresponds to the provisions of the law'. In case of any illegal instruction being issued by anyone, or of any illegal act or omission, the Prokuror's office must challenge the illegality, *i.e.*, bring the matter to the notice of the next highest organ of State power. If the decision of this organ is also inconsistent with the law, it can be challenged in its turn. In this way 'the problem can go up to the highest organs of the State, which then give a binding decision'.[70] In acting thus, the Prokuror is expected both to use his personal initiative and to follow up complaints from citizens.

(b) In his capacity as Public Prosecutor, the Prokuror represents the State in all judicial proceedings. If in his view any decision of the court is wrong, he can challenge it and take the case to the next highest court, right up to the Supreme Court.[71]

[70] Vyshinski, p. 473.

[71] His right applies also to civil cases, and in criminal cases he has the right of appeal against a prisoner's acquittal. He may also undertake a civil case on behalf of a citizen if this is in the public interest. Recently, the right to appeal against a sentence 'once it is legally in force' has been reserved to senior members of the hierarchy of Prokurors.

(c) The sanction of the Prokuror or of a court is required for any arrest.

(d) The judicial investigators operate under his authority.

There is a close tie-up in practice between the Prokuror system and the Party and State security organs. 'In order that it should be a strong and flexible weapon in the hands of the working-class dictatorship in its struggle for Communism, the Prokuror must work under the closest supervision of, and in the closest contact with, the party organisations which offer the most effective guarantees against local or personal influences.'[72] In his task, he must co-operate 'with the organs of the N.K.V.D. and with the courts in a decisive struggle against all remnants of the Trotsky-Bukharinite bandits, the hirelings of fascist intelligence services, spies, wreckers, thieves, hooligans' and so on.[73]

First and foremost, the Prokuror is 'the guardian of Socialist legality, the executor of the policy of the Communist party and Soviet power, a fighter in the cause of Socialism'.[74] His position is deliberately intended to be outside the system of elective organs of State power in the various republics and the local government areas. He must watch over the local administration and the local machinery of justice, and keep them to the laws, ukazes and directives of the supreme authorities of the Union. It is doubtful, in view of the above quotations, whether he is likely to protect the citizen in cases where 'political unreliability' is involved, but a conscientious Prokuror can do much to defend citizens against abuse of power by local authorities or officials.

12. *The Citizen and the Administration.*

The reader who has some knowledge of Continental law will be looking for a Russian equivalent of the special administrative courts, a Russian 'Conseil d'Etat' for hearing citizens' cases against the State. There is, however, no hierarchy of this type of administrative courts in the U.S.S.R. State prosecution of citizens or officials for any serious offence not committed on the transport system is heard by the ordinary courts. The following means exist for an aggrieved Soviet citizen to obtain satisfaction against the State :

(a) The right of complaint. This is 'the most important means of ensuring legality in Soviet administration'. 'The right of complaint in the Soviet State has this essential characteristic, that . . . it is the means of defending the legal rights of citizens . . .'.[75] An elaborate procedure exists by which the complaint must be investigated within a given period of time, and the complainant is

[72] Vyshinski (quoting Lenin), p. 473.
[73] *Ibid.*, p. 481. The political jargon is definitely '1938'; in 1948 there would be a reference to the Hirelings of Imperialist Warmongers.
[74] *Ibid.*, p. 484.
[75] *Administrative Law*, p. 137.

shielded from repressive acts save in cases of malicious and libellous complaints. The complaint may be addressed to the head of the office committing the alleged illegal act, or to the Prokuror, or to a State Control office (as well, of course, as through Party channels). If no satisfaction is obtained, the complainant may make representations to the next highest administrative level. The Party is enjoined to assist in this system of complaints, as its proper functioning helps to keep the administration on its toes.

(b) The right of appeal to the courts. This is limited in scope principally to 'the prevention of breaches of Socialist legality in the levying of administrative fines and non-payment of taxes'.[76] A variety of State and other institutions have the right of imposing fines (*e.g.*, city officials of Moscow may fine citizens for non-compliance with by-laws). The accused has no right of appeal on the substance of the case; he may, however, refuse to pay the fine, and then the case is heard by the courts—who confine themselves to deciding whether the authority in question was *intra vires* in levying the fine and do not consider the rights and wrongs of the decision of the administrative organ. Where the fine is levied by an institution (*e.g.*, by an office or factory for spoiled work), no appeal to the courts is possible, and the money owing is simply deducted from pay.

(c) The Prokuror, as already stated, watches over the legality of administrative acts. Citizens' complaints may be taken up, and the Prokuror's office may challenge the illegal act all the way up the administrative hierarchy, up to the Government and Ministries of the U.S.S.R., whose acts are not challengeable by the Prokuror-General.

(d) A hierarchy of State Arbitration Tribunals hear disputes between the various economic organisations of the State. Where an organisation can persuade the Prokuror that it has been unfairly treated, the latter can appeal to the Chief Arbitrator, who is attached to the Council of Ministers. The decision of State arbitration tribunals is binding on both parties. Disputes within the same sphere of ministerial responsibility (*e.g.*, between two trusts of the Ministry of Heavy Industry) are heard by the ministerial arbitration tribunal, whose decision is final. Arbitration is not relevant to cases 'where one of the parties is below the other in the same hierarchy, as the orders of the superior organisation are binding for its inferiors'.[77] With all industry owned by the State, the significance of these Arbitration Tribunals is clearly much greater than they would have in this country.

It will be seen that outside of the small sector reserved to the courts, the citizen's rights against the State are confined to appeals to higher administrative instances, who are expected to reverse the

[76] *Administrative Law*, p. 117.
[77] *Ibid.*, p. 134.

decision complained of.[78] With the Party in control at each level, it may be said that this system, while affording protection against illegal acts by individuals, is helpless in the face of any Party-backed decisions, provided the Party organ is high enough in the hierarchy to wield the necessary influence.

13. *Some Conclusions.*

The Soviet theory of State and Law follows logically enough from the premises on which it rests. If ' the Party embodies the desires and yearnings (sic) of the people ',[79] then the constitutional forms which give the most efficient expression to the Party's policy represent a perfect form of democracy. If ' there can be no conflict in Soviet society between law and morality because both represent the ideology and outlook of the whole monolithic Soviet society ',[80] then Soviet law axiomatically represents the General Will of the people. If the interests of the State, in the Soviet class-less society, must always be identical with the interests of the individual, then the omnipotence of the State (and of the Party) is in itself a ' guarantee of the maintenance of the interests of the individual '.[81]

Of course, the above seems to the Western constitutional lawyer to be altogether too rosy a picture. The Party may become corrupted, as others have been before it, by the unchallenged exercise of absolute power. Its leaders may come to identify the furtherance of their own power or privileges, or considerations of administrative expediency, with the interests of the people. Many instances might be quoted of legislation which seems to have little connection with the desires of the masses of the people (for example, the imposition of a fine of up to a quarter of a worker's monthly wage for being more than twenty minutes late to work). Absolute power, in the nature of things, is liable to be abused, and Soviet constitutional theory and practice seem to be well fitted for such abuse.[82]

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[78] This applies to the *administration* at all levels, but not to economic undertakings; the latter are endowed with a legal personality, and may be participants in a civil action. Thus a citizen whose suit was ruined at a State-run dry-cleaning establishment may sue that establishment for damages before the ordinary courts.

[79] Levin and Karass, p. 32.

[80] *Op. cit.*, p. 36.

[81] Denisov, p. 119.

[82] It has come to notice that one of the books quoted in this article, *Administrative Law*, by Yevtikhiev and Vlasov, has been the subject of official criticism, and is to be re-written by its authors. It is felt, none the less, that the quotations made are not without value.

SUB-DELEGATION AND CIRCULARS

THE law relating to the constitutional effects of delegated legislation was never distinguished by an elegant simplicity. Now that the children of statutes have their own prolific families of children, grandchildren and still more remote descendants, the offspring threaten to outdo their progenitors in waywardness. It is now settled law that the maxim *delegatus non potest delegare* applies to regulations made by Ministers of the Crown.[1] Sub-delegation of statutory powers is justified only where the parent Act expressly or impliedly authorises the delegate to empower himself or other authorities to exercise the statutory powers conferred upon him. But whether the parent Act can be construed as giving authority to sub-delegate must remain a difficult question of interpretation in each individual case.[2] In two recent Special Reports the House of Commons Select Committee on Statutory Instruments has drawn attention to examples of sub-delegation that were of doubtful validity.[3] Also, recent cases concerned with sub-delegation have raised two particularly awkward problems: (1) What types of instruments are to be regarded as sub-delegated *legislation*? (2) Is there any legal requirement that sub-delegated legislation should be published in the Statutory Instruments series?

The issues involved in the first of these cases, *Blackpool Corporation* v. *Locker*,[4] have been widely discussed in the national Press and in various periodicals.[5] The judgments in the second case, *Jackson Stansfield & Sons* v. *Butterworth*,[6] if less replete with memorable epithets, are of no less interest. The plaintiffs, a firm of builders, had obtained a written licence from the borough surveyor of a local authority to carry out repairs for the defendant, but later found that the total cost would exceed the £35 specified in the licence. The borough surveyor gave them oral permission to spend up to £100, and after the work had been completed he issued a supplementary written licence authorising the excess expenditure. When sued for the cost of the work the defendant raised the defence of illegality; he contended that the licence authorising the excess

[1] *Allingham* v. *Minister of Agriculture* [1948] 1 All E.R. 780 (noted in (1948) 11 Mod.L.Rev. 339). Writing in 1944, Dr. C. K. Allen regarded the position as being still open: *Law and Orders*, p. 104.

[2] See John Willis, '*Delegatus non potest delegare*' (1943) 21 Can.Bar Rev. 257. For United States law see Gellhorn, *Administrative Law: Cases and Comments* (2nd ed.), pp. 206–15, 222–8. See also pp. 39–40, *infra*.

[3] Third Special Report, H.C. 187 (1945–6) §§ 16–17; Special Report, H.C. 201 (1947–8), §§ 3–4.

[4] [1948] 1 K.B. 349 (noted in (1948) 11 Mod.L.Rev. 337).

[5] See especially A. E. Currie, 'Delegated Legislation' (1948) 22 Australian L.J. 110; C. K. Allen, 'Squaring the Circular', *The Spectator*, February 13, 1948.

[6] [1948] 2 All E.R. 558.

was invalid.[7] The Court of Appeal (Scott and Asquith L.JJ.; Jenkins J. dissenting) found in his favour on the grounds that only written licences were contemplated by the relevant legislation, and all members of the court agreed that the supplementary licence could not have had retrospective effect.

The ordinary citizen might well feel inclined to adopt the attitude of Jenkins J. and ask ' whether the court should regard a purely technical breach of the regulation, involving nothing against the public interest, as sufficient ground for absolving the defendant from his undoubted obligation to pay for work done on his property and at his request '.[8] However, the present note is concerned only with Scott L.J.'s observations on the wider constitutional aspects of the case. The Minister of Works had received his licensing powers from Defence Regulation 56A, which also delegated to him limited powers, not germane to the case, to make regulations thereunder. Several circulars dealing with licensing policy were issued to local authorities by the Minister of Health. An important sentence in one of these circulars stated that the Minister of Works authorised officers appointed by local authorities to issue licences on his behalf up to a limit of £100. In addition, notes for the guidance of local authorities and applicants were issued from the Ministry of Works. Scott L.J. drew attention to the following points: (1) The Minister of Works, acting without legal authority, had divested himself of his responsibilities for the licensing system and had conferred them upon the Minister of Health and local authorities. This contravened the maxim *delegatus non potest delegare* and was also calculated to deprive Parliament of its political control over the system. (2) The relevant documents were withheld from publication in the Statutory Rules and Orders [9] series ' presumably because they are merely administrative in character, or, where legislative, because they constitute sub-delegated legislation, falling outside the purview of the Statutory Instruments Act, 1946, and previous practice '.[10] (3) The circulars and notes for guidance included legislative as well as administrative material.

On the first point, it may be doubted whether the role assigned to the Minister of Health was in substance anything more than that of a convenient channel of communication with local authorities. This was the submission of the Attorney-General, who appeared as amicus curiæ on behalf of the Minister of Works. Clearly, however, care ought to be taken in the wording of circulars to avoid creating the impression that the Minister of Health is personally issuing mandatory instructions on matters with which he has no direct concern. It was also submitted that the Minister of Works had not delegated his powers to local authorities; that

[7] Cf. *Bostel Brothers* v. *Hurlock* [1948] 2 All E.R. 312.
[8] At p. 567. See, for another view, (1948) 64 L.Q.R. 440.
[9] Since re-named ' Statutory Instruments '.
[10] At p. 564.

licences were in fact granted by the Minister, but that he had authorised 'officers appointed for this purpose by local authorities to signify his granting of the licences'. Scott L.J., on the other hand, took the view that the Minister had authorised the Minister of Health to hand over the licensing of minor building work 'lock, stock and barrel' to local authorities, the licensing officer's signature 'on behalf of the Minister of Works' being a mere formality. He conceded that the Minister was entitled to choose his own servants for the detailed tasks involved in operating Regulation 56A, but he considered that the 'delegation to another Minister or local authorities of powers of administration and discretion was not within the authority of the Minister of Works'.[11]

The terminology used in some of these dicta may have tended to obscure the point that when a Minister entrusts the exercise of his statutory powers to his departmental officials he is sub-delegating his powers just as when he confers them upon local authorities. All that Scott L.J. wished to emphasise was that the regulation could not be construed as impliedly authorising the Minister of Works to sub-delegate to another Minister or to a local authority. He reached this conclusion despite his admission that he thought the method of administering the regulation through local authorities was 'the best and, possibly, the only practicable way of doing it'.[12] Scott L.J.'s interpretation does not appear unreasonable; for Parliament, in giving powers to a Minister, cannot be presumed to intend that he may entrust them to local authorities whenever it becomes convenient for him to do so. On the other hand, a grant of statutory powers to a Minister always includes an implied authorisation to delegate their exercise (subject to his retaining ultimate control) to his departmental officials, except where the subject-matter shows that the Minister must personally direct his mind to the matter.[13] The paucity of case-law on the topic makes it difficult to forecast when, if ever, the courts will read into a statutory power an implied permission to sub-delegate to persons and bodies outside the department concerned. Scott L.J.'s dicta and (in a somewhat different context) the decision in *Allingham* v. *Minister of Agriculture* [14] suggest that the present tendency is to apply the rule against sub-delegation stringently. But it may be that a Minister is in certain circumstances entitled to appoint as his delegates individual persons from outside his department. Scott L.J. admitted that the Minister of Works could 'choose his own servants for the detailed tasks involved'. What if his Lordship had held that in entrusting his licensing functions to persons appointed by local authorities the

[11] At p. 565.
[12] At p. 560.
[13] The discretionary powers of the Secretary of State under Regulation 18B, para. 1, fell into this exceptional category: *Liversidge* v. *Anderson* [1942] A.C. 206, 223–4, 281. Presumably, also, the formula 'if the Minister is satisfied that . . .' means that the Minister himself must be so satisfied.
[14] [1948] 1 All E.R. 780.

Minister was *not* in effect entrusting them to the local authorities themselves? Might he not then have held that the delegation was lawful?

But assuming that in the *Jackson Stansfield Case* the rule against sub-delegation was broken, it does not follow that the powers invalidly sub-delegated were of a legislative character. The rule applies to the delegation of all types of governmental powers.[15] Now, if the documents delegating the licensing powers were not of a legislative, but of an executive (or administrative), character, there could be no question of their being published in a series as sub-delegated legislation. The nature of those documents will be further discussed below; here it is enough to point out that the immediately following remarks on the publication of sub-delegated legislation are not necessarily applicable to the documents in question.

Both in *Blackpool Corporation* v. *Locker* and in the *Jackson Stansfield Case* Scott L.J. said that the Statutory Instruments Act, 1946, made no provision for the publication of sub-delegated legislation. Since that Act did not become operative until January 1, 1948, the situation in both cases was governed by the Rules Publication Act, 1893, now repealed by the 1946 Act. But was it correct to say that neither of these Acts applied to sub-delegated legislation? Section 4 of the 1893 Act, read together with S. R. & O., 1894, No. 734, provided that (subject to certain exceptions) statutory rules, which were broadly defined as regulations of an executive and not a legislative character made by His Majesty in Council, the Lord Chancellor or a Government Department *under* an Act of Parliament, were to be published by His Majesty's Stationery Office. This was interpreted as covering only primary delegated legislation, although under emergency legislation and in some other special cases exceptions were made for the benefit of the public.[16] The interpretation, however, was only an administrative one, and the Act was by no means unambiguous on the point. It is possible to argue that sub-delegated legislation is legislation made 'under' the parent Act. The Statutory Instruments Act has replaced the term 'statutory rule' by 'statutory instrument' which covers (a) cases where *by* future Acts power to make regulations is conferred upon His Majesty in Council or any Minister and is expressed to be exercisable by statutory instrument (section 1 (1)), and (b) cases where *by* a previous Act power to make a statutory rule within the meaning of the 1893 Act was conferred upon a rule-making authority specified in that Act (section 1 (2)). But reg. 2 (1) (*a*) of the Statutory Instruments Regulations, 1947,[17] made under the 1946 Act provides that the

[15] See Willis, *loc. cit.*
[16] Sir C. T. Carr, *Delegated Legislation*, pp. 46, 62; *Concerning English Administrative Law*, pp. 90–91.
[17] SI, 1948, No. 1.

term ' statutory rule ' shall include every document of a legislative and not an executive character made after the commencement of the 1946 Act by a rule-making authority in the exercise of a statutory power conferred on that authority *by or under* an Act passed before 1948. The use of the expression *by or under* may be in some way connected with the fact that for some obscure reason the word *by* was used in section 1 (2) of the 1946 Act and the word *under* in section 4 of the 1893 Act. An alternative explanation is that the words *by* and *under* were juxtaposed in order to bring out the point that section 1 (2) applies to sub-delegated legislation as well as to primary delegated legislation. In any event, the word *by* is no less ambiguous than the word *under*; it would not put an undue strain upon the meaning of the word *by* to hold that it covers sub-delegated legislation. The juxtaposition of the word *under* in reg. 2 (1) (*a*) may therefore be regarded either as superfluous, or (in accordance with the principle that recourse may be had to regulations made under an Act in order to illuminate obscurities of meaning in the Act itself) [18] as emphasising that section 1 (2) is intended to apply to sub-delegated legislation.[19]

If, then, the circulars and notes for guidance in the *Jackson Stansfield Case* were legislative in character, corresponding documents issued after 1947 might be expected to appear in the official Statutory Instruments series. However, the documents in question do not seem to bear that character. To formulate a definition distinguishing between legislative powers and executive (or administrative) powers is not a task that will be attempted here. Even the Committee on Ministers' Powers (of which Sir Leslie Scott was latterly chairman and whose report he shared in drafting) fought shy of the problem, although it was confident enough of its capacity for generalisation when dealing with terms like ' quasi-judicial '. Instead, it was content to distinguish them by listing examples of executive powers. One example of an executive power so listed was the power to license.[20] Would the Committee have said that a document sub-delegating such a power was legislative in character?

[18] *Re Wier* (1871) L.R. 6 Ch. 875.

[19] On March 23, 1948, in a written answer to a parliamentary question, the Financial Secretary to the Treasury said that in the case of Acts passed before 1948 the publication of sub-delegated legislation was governed by the Statutory Instruments Act, 1946, and the regulations made thereunder, and that a document was not precluded from being a Statutory Instrument or from being published solely because it was sub-delegated legislation. In the case of Acts passed after 1947, the point was governed by the wording of the enabling Act: 448 H.C.Deb.Q. 310; see also 446 H.C.Deb.Q. 16–17. On the other hand, in the debate on the Third Reading of the Statutory Instruments Bill the Solicitor-General appeared to take the view that clause 1 (later s. 1 of the Act) did not apply to sub-delegated legislation. If the latter view were the authoritative one, the force of the foregoing argument would disappear. At present, Orders made under Defence Regulations are published in the Statutory Instruments series.

[20] Report, Cmd. 4060/1932, p. 20.

Whatever may be the answer,[21] it is clear that in the majority of circulars, notes for guidance and similar documents, including the documents mentioned in court, the instructions (whether legislative or executive) that directly affect the rights of the public are overshadowed by a mass of instructions and advice on policy and general administration that could not possibly be described as legislative. For these reasons, the Statutory Instruments series is not the appropriate medium for publishing circulars. It is, indeed, doubtful whether any serious suggestion for publishing them in that series has been made. The task of deciding whether a document falls within the definition of a statutory rule under section 1 (2) of the 1946 Act is entrusted to a Statutory Instruments Reference Committee[22]; but this Committee deals only with questions referred to it by departments, which are not bound to refer any document.

The position may be summarised as follows: It is often difficult to say whether a circular sub-delegating a Minister's powers includes legislative material; even if partly legislative, a circular usually consists mainly of administrative advice; circulars would therefore be out of place in the Statutory Instruments series, and it may be that they are not considered for inclusion in it. Nevertheless, many circulars do affect the rights of the public, and it is unsatisfactory that the public may be without means of access to the relevant passages in such cases. Some departments, notably the Ministry of Town and Country Planning, have a high proportion of their circulars and notes for guidance published by the Stationery Office outside the Statutory Instruments series. The Ministry of Health, on the other hand, issued 173 circulars in the last recorded twelve-months' period, but had only fifteen published. Moreover, as a general rule it declines to supply copies of its unpublished circulars on request, though exceptions are made. An annual index to all of the Ministry's circulars is published by the Stationery Office, but this is of little value to members of the public except in so far as it gives the distribution lists of individual circulars. A personal approach to a local authority may, of course, produce the desired result, but no defender of the present system could use this possibility as an argument in its favour. However, copies of nearly all circulars are sent to local government periodicals, to the appropriate technical journals, and to the publishers of standard works on the topics affected; and occasionally information

[21] The problem is one of considerable difficulty, since regulations delegating licensing powers were sometimes published in the Statutory Rules and Orders series: see, *e.g.*, Motor Vehicles (Driving Licences) Regulations, 1937 (S.R. & O., 1937, No. 438). The power to requisition is presumably an executive power, and A. E. Currie (see note [5] *supra*) has argued that the circulars delegating requisitioning powers in *Blackpool Corporation* v. *Locker* were only executive in character. A recent Australian case, *Arthur Yates & Co. Pty., Ltd.* v. *Vegetable Seeds Committee*, 72 C.L.R. 37, drew attention to some of the difficulties of distinguishing between the two types of powers.

[22] Established under reg. 11 of the Statutory Instruments Regulations, 1947.

is given by the various ministries by means of statements in Parliament and Press hand-outs.

There is no reason to suppose that the reluctance to make circulars readily available to the public is actuated by any alarming motives. The explanation is surely much simpler. First, the majority of circulars are of an ephemeral nature, give general information about departmental policy and administrative matters, and have no direct effect upon the rights of the public. Secondly, it is arguable that if circulars are to be disclosed, then so should letters, 'directions', and in fact instructions conveyed by any method of communication in the administrative process; for these too may involve alterations in the rights of the subject and even breaches of the law. One can only reply that it is better to draw an arbitrary line than no line at all. It is better that circulars should be given wider publicity than that cases like *Blackpool Corporation* v. *Locker* should recur.[23] A possible solution might be to provide that circulars and analogous documents which are not Statutory Instruments but which purport to have mandatory effect should be published in a new series. No such document would bind the public unless published in this series, or unless exempted from publication as confidential or for some other prescribed reason by an independent Reference Committee.

S. A. DE SMITH.

[23] For further judicial criticism of requisitioning circulars, see Streatfield J. in *Patchett* v. *Leathem* [1948] W.N. 473.

A new system is now in force whereby requisitioning powers are delegated to the clerk to the council by a separate instrument for each individual case, setting out the conditions more clearly, and a copy of the instrument of delegation is available to the owner or his agent.

THE SERVANT'S COURSE OF EMPLOYMENT

I

THE master is vicariously liable for his servant's tort to a third party if the tort has been committed within the servant's course of employment.[1] This principle is familiar enough, but acute difficulties have nevertheless arisen in its application, and a new attempt is here made to sort them out.

The principal problem confronting the lawyer is to distinguish between torts within and without the course of employment. Although vicarious liability operates on that distinction, the term 'course of employment' is really of no help at all because it does not provide the necessary criteria by which we can decide why or when a certain act comes within the course of employment. Hence, before asking the omnibus question, 'Has the servant acted within the course of employment', it is essential to go behind that phrase and to ascertain the precise legal characteristics of each particular situation. Now it is obvious that the situations in which a master has been, or may be, held liable are as variable as the sets of possible circumstances that may occur. But it is submitted that the manifold cases can, and must be, divided into four distinct classes of which each represents a specific type-situation. Perhaps far too little attention has hitherto been drawn to this vital need for a neater classification of the cases, and this has also been the cause of much of the confusion that surrounds this subject.[2] We need not therefore be as pessimistic as, for instance, Professor (now Judge) Batt who has said that 'only a vaguely general statement of the law can be made', and that the 'standard (of liability) is conventional and, in a sense, arbitrary'.[3] For once we have separated and distinguished the four type-situations, many of the difficulties will be found to disappear and a satisfactory precision of the rules will be achieved. We proceed, therefore, to

[1] The master and servant are jointly liable, but there are some exceptions; the master is not liable where (a) servant and plaintiff were in 'common employment', (b) the master has lost the 'right of control' under the principle of *Mersey Docks and Harbour Board* v. *Coggins and Griffiths*, [1947] A.C. 1, (c) the master cannot be sued on the grounds of 'capacity', but see *Smith* v. *Moss*, [1940] 1 K.B. 424. The servant will not be liable, though the master will, under the principle in *Said* v. *Butt*, [1920] 3 K.B. 497, 506. Moreover, the master may recompense himself: *Adamson* v. *Jenkins* (1827), 4 Bing. 66; *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816. For other exemptions from liability, see *English and Empire Digest*, Vol. 34, pp. 153–5.

[2] The only judicial attempt at classification is that by Lord Phillimore in *Goh Choon Seng* v. *Lee Kim Soo*, [1925] A.C. 550, at p. 354. But it is not a very helpful classification being neither sufficiently comprehensive nor precise.

[3] *Master and Servant* (3rd ed.), pp. 238, 239.

consider the four classes of cases or four type-situations; they are as follows:—

(1) Cases where the servant is negligent in the performance of his employment duties;

(2) Cases where the servant commits an intentional tort in the performance of his employment duties;

(3) Cases where the dispute arises with regard to the extent or nature of the servant's express or implied employment duties;

(4) Cases where the servant makes a détour in driving his master's vehicle and injures the plaintiff.

It is clear that (1) and (2) deal with the servant's *performance* of his work, and we shall call them both the 'performance cases', although—as will be seen later on—a distinction must be made between negligent and intentional misperformance. The main inquiry in these cases is to determine whether the servant's tort was committed *in the performance*, or was attributable to the performance, of his employment, and hence what is really meant by the phrase 'the servant has acted within the course of employment' is simply that he has caused the injury in the actual performance of his work.

This distinction between a tort within and outside performance leads to the very core of vicarious liability in English law. For why should the master be liable at all?[4] The usually advanced theory of 'implied authority' cannot be an explanation, because there is obviously no truth in the contention that the master has impliedly authorised the commission of a tort even if that tort is connected with the 'class of acts' which the servant was expressly employed to do. In fact, implied authority begs the very question at issue, *i.e.*, has the employer really authorised the tort, and is therefore purely fictitious in its application.[5] Indeed, if there were any evidence of the master's consent, whether express or genuinely

[4] See generally Baty, *Vicarious Liability*; Laski, *The Basis of Vicarious Liability* (1916), 26 Y.L.J. 105; Smith, *Frolic and Détour* (1923), 23 Cal.L.R. 444, 716; Douglas, *Vicarious Liability and Administration of Risk* (1929), 38 Y.L.J. 584, 720. A tabulation of the various ethical bases of respondeat superior is given by Dr. Baty, *op. cit.*, p. 148 (reprinted 23 Cal.L.R., p. 455). Both Professors Smith and Douglas contend that the only acceptable rationale of vicarious liability is the belief that it is socially more expedient to spread or distribute the losses in the carrying on of industry over a large group of the community, *e.g.*, a company, rather than to cast them upon the servants. This distribution of losses is part of modern business administration of costs and risks. This is often called the 'entrepreneur theory'. For views against vicarious liability, see Baty, *op. cit.*, Chaps. I, V, VIII, IX; Holmes, 5 Harv. L.R. 14; Hackett, 7 H.L.R. 108.

[5] For a discussion of 'implied authority', see Baty, *op. cit.*, pp. 87–102; on p. 149 he calls it 'a Pyrrhonistic view, in essence destructive of all reason and argument . . .'. See also, G. E. Curtis, 14 Can.B.R. 725, 727. The point that 'implied authority' is a question-begger was first made by Bowen, L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Ry.*, 18 Q.B.D. 714 at p. 718. In *Lloyd* v. *Grace, Smith*, [1911] 2 K.B. 489, Farwell, L.J., said (at p. 512) that this reasoning of Bowen, L.J.'s, seemed unanswerable.

implied, the latter would not be liable under the principle of vicarious liability, but under either of the following two principles, both stated in the *American Restatement of Agency*. First, if the master intends the consequences of another's conduct which result from his directions, he would be as liable as if he had personally performed the act or produced the result (see § 212, and Comment thereto). Second, if the master authorises conduct, but does not intend its results, the master will be liable for the tort which the servant may commit, *e.g.*, by misunderstanding the directions (see § 215 and Comments). But the essence of vicarious liability is liability for unauthorised and unintended torts, and the simple and unsophisticated reason for its existence is that because the master is to get eventually the benefit of the servant's work, the law also saddles him with responsibility for the performance of this work.[6]

We may now deal with the cases falling under (3) which we will denominate the 'employment cases'. Here, the situation is quite different from that in (1) and (2), because we pass from the servant's performance of his employment to the problem of what his employment is, or what its limits are. Contracts of service do not usually contain a precise and exhaustive list of all employment duties.[7] Supposing circumstances arise which are not directly covered by the duties which the servant is expressly employed to perform. Can the servant extend his work and assume new duties without the master's prior consent? Can he alter or change the routine of his work so as to cope with new circumstances? In short, can he deviate from his express duties? The principal inquiry in these cases is whether an authority or consent may be implied to make this deviation. We are speaking in this connection of a genuine, not of a fictitious, implication, by trying to construct a more comprehensive (or implied) contract of service on the basis of the express one with the object of determining whether the servant's deviation comes within the implied contract.

It may be objected that we are now applying the same theory which we rejected for the performance cases, but the answer is that we are not implying an authority for the servant's tort, but an authority for what the servant has not been expressly employed to do. For before deciding in these cases whether the master is liable

[6] This puts the emphasis upon the *quasi-delictual* aspect of vicarious liability. See *Harper on Torts*, s. 291; 'the principle which imposes liability upon the master for tort done while the servant is acting within the range of the employment is based primarily upon the social policy of putting the burden of an enterprise upon him for whose *immediate* benefit the project is carried out and such person's superior ability to administer the risk'. That the basis is quasi-delictual was recognised as early as 1690 in *Boson* v. *Sandford*, 3 Mod. 321, 2 Salk. 440.

[7] The words 'duty' and 'authority' are here used interchangeably, but only if we are referring to duties which may be implied. Strictly speaking an authority is merely a power or permission for the servant, non-performance of which is not a breach of contract. A duty, on the other hand, is an obligation and its non-performance is a breach of contract.

for the servant's wrong, we must first of all determine whether the servant's deviation is valid, *i.e.*, whether an authority may reasonably be implied for it from the nature of the work and the facts of the case. Thus, in the employment cases we are not concerned with the tort as such, but only with the ascertainment of the servant's implied duties of work.

In (3), then, the expression 'course of employment' has quite a different meaning from that in (1) and (2). If we ask whether the servant's act or deviation (not the tort, but the act that led up to the tort) was or was not within the course of employment, we must answer the question whether or not the servant is impliedly authorised to do the act, or to make the deviation, or, to put it more broadly, what is the servant expressly and/or impliedly employed to do?

Now it is possible that cases may arise in which at the same time both the servant's performance and his employment create difficulties, but in such cases we must place each difficulty in its analytical pigeon-hole, be it (1), (2) or (3), and consider them in the way we have indicated above.[8] This way of distinguishing between performance on the one hand and employment cases on the other, may seem somewhat new-fangled, but it is hoped to show later on, when discussing the decided cases, that it is both logical and practical.

Finally, we may deal briefly with the détour cases. They are an exceptional class, and for the following two reasons:

First, the master is liable for his servant's détour, *e.g.*, to see a friend, unless it is a 'frolic of his own' or a 'separate journey'.[9] What is, or is not, a separate journey is, as Cockburn, C.J., pointed out in *Storey* v. *Ashton* (1869),[10] purely a question of degree; in short, in the détour cases the master's vicarious liability operates in fact upon a geographical rather than (as in other cases) upon a functional distinction. Thus, extensive détours would be outside, and small détours inside the course of employment, and it would be an idle task to lay down more precise criteria than that.

The second reason is more fundamental. Why is the master liable at all for his servant's détour even if it is within the course of employment? It is not a case of performance because the servant is not acting *in* the performance of his duties; nor is it a case of extended or altered employment because the servant is neither expressly nor impliedly authorised to make a détour as the

[8] See the discussion of *Abrahams* v. *Deakin* (1891), 1 Q.B. 516, *post*, p. 57.

[9] The detour cases were established by Baron Parke in *Joel* v. *Morison* (1834), 6 C. & P. 501. Professor Smith, *l.c.*, p. 449, has said that 'Baron Parke . . . intended to limit a recognised liability rather than to create liability where none had existed before'. But it is respectfully submitted that *Joel* v. *Morison* definitely extended the master's liability by establishing a new line of decisions.

[10] 4 Q.B.D. 476 at p. 480. For the other cases on détour see Batt, *op. cit.*, pp. 240–242. See also Baty, *op. cit.*, pp. 135–140.

master would still be liable even if he had prohibited it. The only answer that can be given is that this branch of vicarious liability is simply an early attempt to insure the plaintiff against impecunious servants.[10]

Thus it becomes evident that the character of vicarious liability in the détour cases is radically different from the quasi-delictual *rationale* which underlies, as we have seen, the other cases. It is unfortunate, therefore, that it has never been pointed out so far that vicarious liability rests on two principles, and not only on one. The 'entrepreneur theory' is a rather desperate attempt to kill two remote birds with one stone, *i.e.*, to explain the basis of the détour cases in the same way as the other cases in which liability rests ultimately upon the master's benefit from the servant's work and is therefore quasi-delictual. The failure to recognise this duality of vicarious liability in English law can only result in greater confusion.

But however this may be, the détour cases are not important for the purposes of the argument that is to follow and we may leave them at that. We turn, therefore, to the 'performance' and 'employment' cases of which the more important only will here be considered as it would be impossible to deal with the whole of the massive case-material.[11]

II

We begin with the problem of employment, *i.e.*, with the cases falling under (3).

In the early decisions the courts insisted that servants should do, and do only, what they were expressly employed to do, and that no authority would be implied for any kind of deviation, however necessary or justified it might seem in the circumstances. Thus, in *McKenzie* v. *McLeod* (1834),[12] 'the object of a domestic servant was to light a fire' but, in addition, she cleared the chimney before lighting it. Unfortunately, a fire broke out and damaged the plaintiff's furniture in the defendant's house. The latter was held not liable, because, as Tindal, C.J., said, 'she (the maid) was well aware that it was not her duty to clear the chimney'.

Similarly, in *Lamb* v. *Palk* (1840),[13] a coachman tried to move a cart which blocked the passage of his coach through a street. In doing this he injured the plaintiff, but his mistress was held not liable. However, so narrow a view could hardly be maintained, and *Burns* v. *Poulsom* [14] illustrates a remarkable change of policy. The facts were briefly these: A foreman was employed to load iron rails into ships *after* [15] they had been deposited on the ground. One

[11] The cases are collected in the *English and Empire Digest*, Vol. 34, pp. 125–148.
[12] (1834), 10 Bing. 385.
[13] 9 C. & P. 629, overruled in *Page* v. *Defries* (1866), 7 B. & S. 137.
[14] (1873), L.R. 8 C.P. 563.
[15] Italics in headnote.

day he asked a carter to deposit them at a more convenient place so as to facilitate the loading, and when the latter refused he got into the cart to do it himself. Whilst throwing out the rails where he wanted (or needed) them he injured the plaintiff. The court showed a remarkable division of opinion. Brett, J., who was in the minority, believed that the only question in all these cases was what the servant was expressly employed to do and since the foreman was not employed to deposit rails but to load them *after* deposition the master could not be liable.[16] But Denman, J., took a broader view of the circumstances and his judgment (with which Grove, J., agreed) is very instructive : ' The contention of the (master) ', he said,[17] ' proceeds upon too narrow a view of the duty or employment of the (foreman) and I think that the cases establish that, even though in the ordinary course of his employment it would not be part of his duty to assist in moving the rails from the cart, it was still a question for the jury, and not for the judge, whether in this particular case he was acting within the scope of his employment '. This distinction between '*course*' and '*scope*' which, the learned judge said, the cases had established—though none was cited to support it—cannot, however, be accepted. For one thing, the two terms have always been used interchangeably, and for another the distinction is, it is submitted, quite unique in the reports. What the decision really amounts to is this: The majority held that the servant had properly extended or altered his work. Though he was actually employed to load rails after deposition the foreman was considered to be, in the given circumstances, ' impliedly ' employed to do everything that could facilitate his job of loading the rails.

Such would also seem to be the correct analysis of *Smith* v. *Martin and Hull Corporation* (1911).[18] In that case a teacher told her pupil to poke a fire in the teacher's room where the latter proposed to have lunch. The Court of Appeal held that this order to the girl was within her course of employment. The teacher was impliedly authorised to give such an order although her express duty was teaching, for ' it was better ', as Fletcher-Moulton, L.J., pointed out,[19] ' that she (the teacher) should send one of her scholars than that she should leave the class unattended while she did it herself '.

The next case is *Poland* v. *Parr*,[20] the facts of which are well known. A carter walked beside his employer's cart, though at the time off duty, when he mistakenly suspected a boy of stealing some of the sugar on the cart, and he struck him. The Court of Appeal held the master liable. ' In cases of emergency any servant is

[16] At p. 569.
[17] At pp. 566–67.
[18] [1911] 2 K.B. 775.
[19] At p. 783. Farwell, L.J., said at p. 785 that ' it would be disastrous to hold that they (the teachers) can do nothing but teach '.
[20] [1927] 1 K.B. 236; 96 L.J.K.B. 152; 136 L.T. 271.

bound to take reasonable steps to protect his master's property', said Scrutton, L.J.[21] And further: 'An act is not placed beyond the scope of the servant's duty by the mere fact that it is not one of the class of acts which he is specially employed to do . . .'.[22]

But there is a further and more important point in that case. The Court of Appeal recognised the fact that the servant's act had been rather excessive, but both Scrutton, L.J. and Atkin, L.J. (as he then was) pointed out that the excess was not great enough to 'take the act out of the class of acts which the person is authorised or employed to do'. This analysis of implied authority and excess is, it is very respectfully submitted, quite mistaken. Excess is a mode of performance and not a question of employment, and the problem is simply whether the servant was excessive *in* the performance of what he was employed to do. Again, as we have already pointed out, it is wrong to imply an authority for the commission of a tort, whether mildly or strongly excessive, for there is no basis in truth for such an implication. In cases of excess, just as in other cases like these, the questions which must be asked are these: (1) What is the servant expressly or impliedly employed to do? If the servant is not expressly authorised to protect the master's property, can such an authority be implied? (2) Was the excess or other tortious act committed *in* the performance of the express and/or implied duties of protection?[23]

Two other cases must now be considered :—

The first is *Houghton* v. *Pilkington* (1912).[24] A milk-cart met with an accident and the milkman's assistant was injured. The plaintiff volunteered to help to get the injured assistant home, and in doing so was inadvertently injured by the milkman. The Divisional Court held that the volunteer was not barred by the doctrine of 'common employment', but that he was unable to recover because the milkman had no 'implied authority' to accept the plaintiff's aid. Herein they purported to follow *Cox* v.

[21] At p. 243.

[22] At p. 244. But Atkin, L.J., pointed out on p. 245 that the servant is merely authorised, though not bound, to protect his master's property. The term 'duty' is therefore used in two senses: (1) where non-performance of employment duty amounts to servant's breach of contract; (2) where such non-performance does not amount to a breach.

[23] Judge Batt has rightly pointed out, *op. cit.*, p. 254, that the distinction between 'authorised' and 'unauthorised' excesses is purely verbal. For it does not help us to solve the problem 'What is an authorised excess?' The only thing which the servant is in any sense authorised to do is to protect the master's property. Judge Batt continues: 'It is submitted that the distinction is between an act of a servant which is a reasonable mode of performing his duties or an act so totally outside the ambit of those duties as not to be a reasonable performance of them'. He thus introduces a new criterion, *i.e.*, ambit of duty, which, however, does not help us very much. At any rate, Judge Batt's test may much more simply and concisely be expressed by the following question: 'Has the servant acted *in* the performance of his duty (express or implied)?' Admittedly difficult questions of fact may arise, but that need not trouble us if the legal principle is sufficiently clear and precise.

[24] 3 K.B. 308.

Midland Counties Ry. (1849),[25] a case which, it is submitted, had nothing to do with that situation. A railway company was held not liable *in contract* to a surgeon whom one of their stationmasters had engaged to attend to an injured passenger. This was, obviously, a correct decision because the stationmaster had no authority to make contracts for the company. He was their servant, not their agent. But in *Houghton's Case* it seems clear enough that the 'emergency' of the situation should have permitted the milkman to accept the volunteered services of the plaintiff, and since the latter was held not to be caught by 'common employment' he should have recovered. The other case is *Beard* v. *L.G.O.* (1900).[26] The facts were simple : the driver of an omnibus being suddenly taken ill had to delay his return to work after lunch for a short while. The conductor then decided to drive the 'bus himself from the terminus to the stop from which the next trip was to start. Whilst thus driving the 'bus, he ran over the plaintiff. The Court of Appeal held that the conductor had no 'implied authority' to drive the 'bus in the given circumstances. This is, perhaps, not a satisfactory view of this borderline case, for we should have thought that the facts did show a certain urgency. It is essential that public transport keeps to schedule, and probably all that the conductor tried to do was to make possible a punctual departure pending the return of the driver. This view is to some extent supported by some dicta of Vaughan Williams, L.J.[27] : ' . . . it is (not) necessarily beyond the functions of a conductor to take charge of an omnibus in the absence of the driver', and further : 'Though they have different functions to perform it is not inconsistent with that fact that it may be within the scope of authority of one of them temporarily to perform the duties of the other in his absence'. The Court of Appeal also raised the problem of the burden of proof in such cases. Romer, L.J., said [28] that 'the plaintiff should have shown some "special authority" given to the conductor, or at any rate, that there had arisen a case of necessity for the servant to act as he did'. This, it is respectfully submitted, does not state the problem correctly. There was no 'special authority' or 'necessity' in *Burns* v. *Poulson* and *Smith* v. *Martin*. All that the plaintiff can be expected to show are certain circumstances from which the court may reasonably imply an authority to deviate. What are, then, such circumstances? The *American Restatement*, § 229 (2), states, inter alia, the following [29] :—

(a) whether or not the act is one commonly done by servants;
(b) the time, place and purpose of the act;

[25] 3 Ex. 268.
[26] 2 Q.B. 530.
[27] At p. 532.
[28] At p. 534.
[29] Only some are here mentioned. The *Restatement* contains ten in all, but it need hardly be pointed out that its analysis of 'scope of employment' is rather different from the one presented in this paper, and only those items which seem germane to our argument have therefore been selected.

(c) the previous relations between the master and the servant;
(d) whether the master has reason to believe that such an act will be done;
(e) the similarity in quality of the act done to the act (expressly) authorised.

There remains one further topic for examination. What is the position when the employer has issued express prohibitions with regard to certain acts? The 'prohibition' cases are very difficult and rather confused, but there are, it is submitted, two distinct lines of cases. One begins with *Limpus* v. *L.G.O.*[30] and is germane to 'performance' and will therefore be considered in that connection. The other is concerned with employment and will be discussed forthwith. A typical case is *Stevens* v. *Woodward* (1881).[31] The defendants were solicitors. One of them had in his private office a wash basin the use of which he had expressly prohibited to his clerks. In spite of that a clerk came in, washed his hands and left the tap running. This caused a flood and damage to the plaintiff. The defendants were held not liable because the prohibition was material in fixing 'the local limits of the clerk's duties'. It was the same, as Grove, J., said, as 'if he had gone up to his master's bedroom and washed his hands there'. Again, in the recent case of *Twine* v. *Bean's Express, Ltd.* (1946)[32] the facts were these. The defendant company were carriers; they were under contract with the Post Office to carry certain things and certain (specified) passengers to various destinations. One day the plaintiff's husband was riding in the van by permission of the defendant's driver though he was not one of the passengers entitled to ride in it. He was killed through the negligence of the driver and his widow sued the carriers. They were held not liable by Uthwatt, J., (as he then was) because (a) they owed no duty towards the husband as carriers and (b) the defendant's driver had, at any rate, not acted within the course of his employment. With the latter ground the Master of the Rolls (Lord Greene) dealt exhaustively in the Court of Appeal. 'Was the driver, in giving a lift to the deceased, acting within the scope of his employment?' And Lord Greene continued: 'the answer is clearly, No. He was doing something which he had no right whatever to do'.[33] The decision is clearly correct, for the servant's duties were expressly limited, and hence no additional authority could be implied. The 'course of employment' had become crystallised, as it were, and any deviation was therefore outside it. At first sight, this case seems to be inconsistent with *Limpus' Case*, but in reality they are quite different as will be seen at a later stage. Perhaps two more questions may be asked

[30] (1862), 1 H. & C. 526.
[31] 6 Q.B.D. 318.
[32] (1946), 62 T.L.R. 155; (1946), 62 T.L.R. 458; 62 L.Q.R. 113, 316.
[33] 62 T.L.R. 459. For another possible interpretation of *Twine* v. *Bean's Express, Ltd.*, see Dr. Glanville Williams' *The Law Reform (Contributory Negligence) Act, 1945* (1946), 9 Mod.L.R. 105, 134, 135.

before we conclude this paragraph. Supposing there had been no prohibitions in (a) *Stevens' Case* and (b) *Twine's Case*. As for (a), it is clear that the defendants would then be liable because one could imply an authority that the clerks may wash their hands at their place of work before going home.[34] As for (b), the answer may also be in the affirmative.[35] For to give a lift to strangers is an act commonly done by servants and therefore we may easily imply an authority for that deviation.

III

We may now proceed to the 'performance cases', and shall deal first of all with the problem of the servant's *negligent performance* of his work. There can, in general, be little difficulty in determining whether the tortious negligence is within the 'course of employment', provided the servant's duties, express or (as we have explained before) implied, are clear and well defined. In short, once we have determined what the servant is employed to do, his negligent performance of what he is employed to do will render the master liable. Nevertheless, an acute controversy has arisen in connection with two leading decisions, a discussion of which may elucidate the problem in hand. In *Williams* v. *Jones* (1865)[36] the servant was smoking while making a sign-board (which he was employed to make) and negligently set on fire the plaintiff's shed in which he was working. A majority in the Exchequer Chamber held the employer not liable because the fire originated in an unnecessary act, *i.e.*, smoking, and hence was held to be outside the course of employment. In *Jefferson* v. *Derbyshire Farmers* (1921)[37] the servant also smoked whilst handling petrol in the master's garage. This time the Court of Appeal distinguished the former decision and held the master liable, the argument being that pouring out petrol whilst smoking was a negligent way of handling petrol and not merely a negligent way of smoking. Even if, as Atkin, L.J. (as he then was) pointed out, the servant had not been smoking himself, but had allowed a stranger to stand near him and light his pipe, the master would still have been liable because this would have constituted a lack of precaution on the servant's part. In the recent decision of

[34] In Illustration 10 of § 229, the *Restatement* gives a different result, *i.e.*, that such an act would not be within the servant's course of employment. But the *Restatement* is, in this instance, hardly consistent with itself, for is not the washing an 'act commonly done by servants' and an act which 'the master has reason to expect that it will be done?' See *Ruddiman* v. *Smith* (1889), 60 L.T. 708; 5 T.L.R. 417.

[35] The emphasis is on 'may' for it depends on the circumstances. In the case of long-distance hauliers an authority to give lifts may easily be implied because this is 'an act commonly done' by hauliers.

[36] 3 H. & C. 602, *per* Erle, C.J., Keating and Smith, JJ., *diss.* Blackburn and Mellor, JJ.

[37] 2 K.B. 281.

Century Ins. Co. v. *Northern Ireland Transport Board* (1942)[38] the servant was transferring petrol from a lorry to a tank, and negligently caused a fire, again whilst smoking. The House of Lords followed the *Jefferson Case* in preference to *Williams' Case*.

Now it has been argued, in the first place, that the House of Lords case virtually overrules *Williams* v. *Jones*, and that the latter is a wrong decision anyhow.[39] Professor Winfield has contended,[40] on the other hand, that the earlier decision is the correct one and should have been followed in the *Jefferson* and *Century Cases*. Smoking, he says, is as unnecessary in the one situation as it is in the other, just as much as 'letting off fireworks in the shed would have been'.[41] And further: 'One would have thought that the more inflammable an operation is, the less connection with its execution has the lighting of a cigarette'.[42] But very much the more acceptable view is that of Sir John Salmond who believed both *Williams* v. *Jones* and *Jefferson* v. *Derbyshire Farmers* to be correct decisions and quite distinguishable from each other.[43] In the former case the servant 'was doubtless negligent *during* the performance of his master's business, but he was not negligent *in* the performance of that business'. This distinction, it is submitted, hits the nail on the head, because in *Williams' Case* the servant was surely not negligent in making the sign-board, though he was certainly negligent in the handling of petrol in the other cases. To say that smoking was unnecessary for, and unconnected with, the servant's duties is somewhat misleading; the question is not whether the smoking is necessary or not, but whether smoking constitutes a negligent mode of performance. If your dentist whilst pulling out your tooth, lights a cigarette and burns your cheek, the smoking has nothing to do with the dental operation, but it is nevertheless a negligent way of pulling out the tooth. Indeed, if Professor Winfield's argument were pushed to its logical conclusion, a master could never be liable for his servant's negligence, because the more negligent the tort the less connection it has with the execution of the servant's work.

Again, to say that the master should have been liable in *Williams' Case* is equally unsound for that would be stretching vicarious liability too far. The servant may do many negligent things during the time and at the place of his work, but this does not mean that he would necessarily be negligent in the performance of his duty. It is true that the distinction between 'in performance' and 'during performance' is sometimes difficult to apply,

[38] [1942] A.C. 509.
[39] Salmond, *Torts* (10th ed.), p. 91, note (x).
[40] See, Winfield, *Tort* (2nd ed.), pp. 136–37, and (3rd ed.), pp. 121–22.
[41] Winfield, *op. cit.* (2nd ed.), at p. 137. This particular argument is omitted in the 3rd ed.
[42] Winfield, *op. cit.* (3rd ed.), p. 121.
[43] See Salmond's own last edition, *i.e.*, the 6th ed. *op. cit.* (1924), pp. 109, 110.

but this does not make it, as Salmond said, any the less 'real and logical'.[44] This view is supported by the *American Restatement of Agency* which in § 235, Illustrations 5 and 6, makes in fact the same point. Now it has sometimes also been argued that even if the servant was (in *Williams' Case*) not negligent in making the sign-board, he was nevertheless negligent in looking after the shed. However attractive this argument may be, it is not relevant to the problem we have been discussing. It really concerns the problem whether the servant was under a duty to look after the shed, *i.e.*, what was the servant employed to do in the given circumstances. But it may be pointed out that to imply such a duty (to take care of the shed) is quite different from implying an authority for, *e.g.*, protecting the master's property. In the latter case, failure to protect is not a breach of the servant's contract, whereas in the former case a failure to take care would be. It need hardly be said that the latter implication can genuinely be made only if there is very clear evidence to warrant it, and it is not certain at all whether there was such evidence in *Williams' Case*.

IV

The last part of this inquiry will be devoted to the problem of *intentional* (mis)performance. It is important to say, first of all, a few words about the historical development of this head of liability because it constitutes a rather confused chapter of recent legal history.[45] It will be remembered that in the eighteenth, and the first half of the nineteenth, centuries, the master was, broadly speaking, only liable for the servant's negligent performance if his duty and the action that lay against him was in case for the servant's want of care and skill. This was the general rule until the sixties of the century, in spite of frequent attempts to widen the master's liability so as to include the servant's intentional wrongs, attempts which from *McManns* v. *Crickett* (1800)[46] to *Pidgeon* v. *Legge* (1857)[47] remained equally unsuccessful. How then was the law changed? In one respect the theory of 'implied authority' helped in the transformation, for it was the device by which corporations were first held liable for their servant's tortious (negligent and intentional) conduct. But it would be wrong to suggest, as Dr. Baty has done, that 'implied authority' was the only vehicle of legal change.[48] The true explanation is that in the early nineteenth century 'the Scope of Employment phrase, with its congeners, comes into full control',[49] and it is the

[44] See last note.
[45] See Chap. 5 in Baty, *op. cit.*, pp. 78 to 100. His account is, however, too biased to be really valuable.
[46] 1 East 106.
[47] 5 W.R. 649. *Croft* v. *Allison* (1821), 4 B. & Ald. 590 seems to be the only exception. See it discussed in Baty, *op. cit.*, p. 85.
[48] Thus he says on p. 88: 'Judges have expressly placed the liability (*i.e.*, for trespass) on this footing—conscious that it can be placed on no other'.

existence of this new and flexible qualification of the master's liability which enables the inclusion of intentional torts without the courts thinking it necessary to overrule a long line of precedents to the contrary. And the surprising thing is also that this change is brought about by three almost contemporaneous decisions in the early 'sixties, so that only ten years after *Pidgeon* v. *Legge*, Willes, J., could generalise and enunciate the new principle in *Barwick's Case* in 1867 as if the law had never been otherwise.[50] These three cases are still very important because they form the basis of this branch of liability, and they as well as their modern ramifications need to be considered carefully.

The first is *Seymour* v. *Greenwood* (1861).[51] The servant was a conductor employed by an omnibus proprietor in Manchester. The plaintiff was a bus passenger who was thrown out and severely injured by the conductor because of misbehaviour. The servant had thus committed assault and battery, but the plaintiff sued the master not in trespass, but—rather cleverly—in case which, as counsel for the defendant logically argued, was not the appropriate action. However, the Court of Exchequer held that case would lie, Martin, B., remarking '. . . a great deal has been said about the act being purely a trespass; but it was nothing more than the guard of an omnibus pushing out a person who had misconducted himself'.[52] This pushing out was done, as Pollock, C.B., had already said, 'with a want of care and consideration'.[53] Thus the court evaded the age-old distinction between 'case' and 'trespass' by using arguments which, stripped of verbiage, amount to the contention that a battery is 'nothing more' than negligence. However absurd this may be, the decision was affirmed in the Exchequer Chamber. Williams, J., pointed out that the servant '. . . was guilty of excess and violence not justified by the occasion; or, in other words, misconducted himself in the course of his employment'.[54] Thus the latter phrase (*i.e.*, course of employment) is utilised to extend the law and to get out of a difficult situation.

But the more important question as regards the present law is whether *Seymour* v. *Greenwood* is still a valid decision. It was recognised by the courts that the conductor had used excessive violence, and the same is true of the carter in *Poland* v. *Parr*.[55]

[49] Wigmore, *Anglo-American Legal History*, iii, pp. 503–504.
[50] *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, 265.
[51] 6 H. & N. 359; 7 H. & N. 335. Dr. Baty admits that in this case 'implied authority' was not really involved. Since this case was instrumental in extending liability to trespass it is a rather heavy blow against his own theory. As for his contention that this case was one of negligence, see text.
[52] At p. 365.
[53] At p. 364. 'I do not believe that he intended to do more than put the plaintiff solely out of the omnibus.' But see Williams, J.'s opinion, next note.
[54] 7 H. & N. 355 at pp. 357–8, 'the guard . . . was guilty of excess and violence not justified by the occasion'.
[55] [1927] 1 K.B. 236.

In both cases, however, the excess was done in the performance of the servant's express or implied duty and not in a personal craving for dealing out punishment to the plaintiff. The distinction is that where the servant acts in performance of his duty, the tort is committed with the intention of acting 'for' the master, whereas in the other case the servant merely satisfies his own passion. The court must find out in each case what the servant's predominant motive is. Thus, in *Radley* v. *L.C.C.*[56] it was held, on the evidence, that a conductor had struck a boy not for the 'protection of the master's property' but purely for personal reasons and the master was therefore not liable. Again, where the servant uses 'excessive excess' this would be evidence that the servant's motive was predominantly personal. Unless we apply this test of motive it is really impossible to determine in intentional torts whether the wrong was done in the performance of duty or not. How could we otherwise distinguish *Poland's Case* from *Abrahams* v. *Deakin*[57] and *Hanson* v. *Waller*[58] (where the servants had caused the false imprisonment of the plaintiffs who were mistakenly suspected of stealing). If it is right in the one case to imply an authority for the use of excessive violence, why should not in the latter cases an authority be implied for the servant to adopt the more reasonable procedure of handing the 'thief' over to the police. As we have already argued, the implication of an authority for the commission of a tort is purely fictitious, and alien to the theory of vicarious liability, but even if it were admissible, this would not explain why the law should prefer excessive violence to arrest. The only tolerable analysis of the above cases is, it is submitted, that in *Poland* v. *Parr* the carter (1) was impliedly authorised to protect his master's property, and (2) committed the tort in the performance of his implied duty. In *Abrahams* v. *Deakin* and *Hanson* v. *Waller* the servants (1) were also impliedly authorised to protect their masters' property, but (2) were not committing their torts in the performance of their duty, *i.e.*, not for the benefit of their masters, but for predominantly personal reasons because—so the courts held—the emergency had passed and the servants were merely satisfying their own sense of justice.[59]

Now it will be noticed that we are here applying a test, *i.e.*, was the servant performing for his master's benefit, which was categorically rejected by Lords Halsbury and Macnaghten in *Lloyd* v. *Grace, Smith & Co.*[60] Perhaps the servant's motive might be more correctly expressed by saying that the servant must

[56] 109 L.T. 162.
[57] [1891] 1 Q.B. 516.
[58] [1901] 1 Q.B. 390.
[59] Applying the test 'for, etc.' we can also explain *Joseph Rand, Ltd.* v. *Craig*, [1919] 1 Ch. 1.
[60] [1912] A.C. 712, overruling C.A. in [1911] 2 K.B. 489. See also *Uxbridge* v. *Pickard*, [1939] 2 K.B. 248; *British Ry. etc. Co.* v. *Roper* (1939), 162 L.T. 217.

act 'for the master's *prospective* benefit', or 'in the interests of the master', or simply 'for the master', but subject to these minor corrections, the test, it is humbly submitted, seems eminently valid. It is, of course, commonplace that a House of Lords decision cannot be tampered with; but if the cases on the servants' intentional misperformance are to be harmonised, and to be explained according to a rational and general principle, we must regard *Lloyd's Case* as unacceptable on this point—especially if the decision itself may still be supported on other grounds.

First, it can be argued that the solicitor was liable in contract for his servant's fraud. Lord Loreburn adopted this ground, among others, in the House of Lords,[61] and Sir Frederick Pollock has pointed out that the relation of solicitor and client is both at law and in equity a personal one, and that 'the client is entitled to have his business supervised, where it is not actually conducted, by the solicitor whom he employs: *Hopkinson* v. *Smith* (1823), 1 Bing. 131'.[62] On this view the solicitor is liable because he commits a breach of contract, and not because of his vicarious responsibility in tort.

Secondly, it may be argued that the doctrine of estoppel is clearly applicable. As Scrutton, J., put it in the lower court, 'Who is to suffer for this man's fraud? The person who relied on Mr. Smith's accredited representative, or Mr. Smith who put the rogue in his own place and clothed him with his own authority'.[63]

This attack on *Lloyd* v. *Grace, Smith & Co.* is strongly supported by the *American Restatement of Agency*. In § 235 it is laid down: 'An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of, or incident to, a service on account of which he is employed'. The *Restatement* is also careful to point out that the master will not be liable if there is no evidence at all that the servant intended to act for his master. But the master will nevertheless be liable if the servant is actuated *to any appreciable extent* by the desire to serve the master's business, even though the motives are mixed or dual. (See Comment (b) to § 236.)

There is further support for the contention that motive is

[61] At p. 724.

[62] (1913), 29 L.Q.R. 10.

[63] [1911] 2 K.B. 489, 504. This was also the ground taken by Vaughan Williams, L.J., in C.A. See also *Slingsby* v. *District Bank*, [1932] 1 K.B. 544. The only disadvantage is that 'estoppel' is 'officially' not a cause of action, but only a rule of evidence. Nevertheless, the principle has been applied in commercial law as if it were a rule of law, under the name of the rule in *Lickbarrow* v. *Mason*, 2 T.R. 63, 70; 1 S.L.C. 703; Pickering, *Estoppel by Conduct* (1939), 55 L.Q.R. 401, 402–3. In *Pollock on Torts*, 14th ed., p. 61, the same distinction is made: 'on principle there seems to be a considerable distinction between the positions of a person dealing with an agent as representing the principal in the way of his business, and in reliance on the *agent's ostensible authority*, and of a stranger who happens to be injured by a servant's want of care . . .' (my italics).
Similarly, Winfield, *op. cit.*, 124.

relevant in the judgments in *Limpus* v. *London General Omnibus Co.* (1862).[64] This is the second of the three basic decisions in the 'sixties, and the master was there held liable in spite of the servant's disobedience of orders not to race with rival omnibuses. The reason of the liability appears from Martin, B.'s, direction to the jury, in which the learned judge ruled that the master was liable if 'the tort was committed within the course of employment' and even though 'the servant acted recklessly, wantonly and improperly, but did what he believed to be in the interests of the master'.[65] The decision went in error to the Exchequer Chamber where all the judges, apart from Wightman, J., approved of it. The judgments, and particularly Baron Martin's direction to the jury, reveal, when scrutinised, how once more use was made of the phrase 'course of employment' and how under its cloak the master's liability was extended to cover the servant's intentional misperformance, although it was prohibited. But the courts also insisted that the intentional tort must be committed in the interests of the master, and Willes, J., pointed out that this had been the law since *Huzzey* v. *Field*.[66] It may be mentioned in passing that in *Huzzey's Case* the master had actually received the benefit from the servant's wrong, *i.e.*, he had received the proceeds of an illegal operation of a ferry, which might be considered as the master's ratification of the servant's tort.[67] However, this does not justify Dr. Baty's criticism of *Limpus' Case* and the application therein of the test of motive.[68] The servant's intention is the only guide to the purpose of his deliberate tort. And, to repeat, it is the purpose or motive which determines whether the servant has acted *in* the performance of his duty or not. In short, in the case of deliberate torts the expression 'within the course of employment' means that the servant has acted in performing his duty, *i.e.*, 'for' his master.

The third basic case we wish to examine is *Goff* v. *Great Northern Ry.* (1861),[69] which concerns the liability of corporations. The company's servant was a ticket-collector who had arrested the plaintiff-passenger when the latter handed to him an expired ticket. The servant was empowered (by the Railway Clauses Act, 1895) to arrest passengers travelling without, or with invalid, tickets. But the plaintiff *had* a ticket and soon explained that he had parted with it by mistake. The servant disbelieved him and kept him under arrest. The plaintiff sued the company for the

[64] (1862), 1 H. & C. 526.
[65] At p. 529.
[66] (1835), 4 L.J.Ex. 239, 2 C.M. & R. 432.
[67] Baty, *op. cit.*, p. 91; it may be pointed out that 'it is part of the history of the law that the judgment in *Huzzey* v. *Field*, although delivered by Lord Abinger, was prepared by Lord Wensleydale [Baron Parke]' 1 H. & C. 526, at p. 540 (*per* Willes, J.).
[68] Baty, *op. cit.*, pp. 90–92.
[69] 3 E. & E. 672.

servant's false imprisonment. Blackburn, J., followed *Giles* v. *Taff Vale Ry.* (1853),[70] where the company had been successfully sued for their servants' conversion of property. Both decisions were based on the theory of implied authority; in other words, it was held that since the servants had an express authority to refuse the return of the property, or to arrest, an authority could be implied for the servant's mistaken exercise of their power.

Unfortunately, the theory had its limitations in spite of this initial usefulness. In *Poulton* v. *L. & S.W. Ry. Co.* (1867),[71] for example, the defendant company was held not liable. The stationmaster had arrested the plaintiff for refusing to pay the fare of his horse. Although the Act of 1895 gave certain powers of arrest (*e.g.*, if the plaintiff had refused payment for himself) there was no such power if the plaintiff refused to pay for his animal, and since the power which the servant purported to exercise was non-existent, there could be no implied authority for its mistaken exercise. This reasoning was followed by Rowlatt, J., in *Ormiston* v. *G.W.Ry.* (1917),[72] but is it satisfactory? It is suggested that it is not. For one thing, the implication of authority is as fictitious in the case of corporations as in the case of individual masters. For another thing, there is a good deal of authority that the corporation's liability does not depend on ' implied authority ' at all, but, as Martin, B., said in *Bayley* v. *M.S. & L. Ry.* (1872),[73] ' we must be governed . . . by the general principles of the law of master and servant, and it is quite immaterial what the by-laws of the company were '. And in the same case Kelly, C.B., states : '. . . the employer is liable even though the acts may be the very converse of that which the servant was actually directed to do '. The facts of the latter case were that the company's servant had a power to see to it that passengers did not travel in wrong trains. He mistakenly pulled out a passenger believing him in the wrong train, and the company was held liable. It is submitted that the principle is also correctly stated by Lord Esher in *Smith* v. *N. Met. Tram. Co.* (1891), 56 J.P. 630. The conductor ejected a passenger from the 'bus because the latter did not at once produce his fare on demand. The company was held liable. His Lordship said ' . . . although the conductor acted negligently, illegally, and improperly, his masters are liable for what he did. The question is not one of authority. It is a case of master and servant . . . and

[70] 2 B. & S. 822.

[71] L.R. 2, Q.B. 534.

[72] [1917] 1 K.B. 598. It must be pointed out that the argument in the text is not concerned with the *ultra vires* torts of corporations. All that is desired to show that *intra vires* torts have nothing to do with ' implied authority ', but that it is based on the relationship of master and servant. As for *Poulton's* and *Ormiston's Cases* it might be argued that the servant committed the tort in the performance of his implied duty of protecting his employer's business. For a full discussion of *ultra vires* torts, see Goodhart, *Essays in Jurisprudence*, Chap. V.

[73] (1873) L.R. 8 C.P. 148, at p. 154.

the master, whether a corporation or an individual, is responsible for acts done by the servant in the course of his employment '.

One final word about the effect of a prohibition upon performance. In *Limpus's Case*, as is well known, the servant was instructed not to race with, and obstruct, rival omnibuses. But the master was held liable because, as Willes, J., said ' the law is not so futile as to allow the master by giving secret instructions to discharge himself from liability '.[74] In *Canadian Pacific Ry.* v. *Lockhart* (1942),[75] the Privy Council followed the Exchequer Chamber. The company's servants had been prohibited from using cars that were uninsured in the performance of their work. In other words (as the *Am. Restatement*, § 239, would put it), they were directed not to use a specified instrumentality as a means of performing their service.[76] A servant used an uninsured car, which was not, to quote again the *American Restatement*, an instrumentality substantially different from that authorised, *i.e.*, insured cars, and the master was held liable to the injured plaintiff. In the course of the Board's judgment, Lord Tomlin said that ' the existence of a prohibition may, or may not, be evidence of the limits of employment '.[77] This, however, is rather vague. If it means that a prohibition may indicate what a servant is employed to do (as in *Stevens* v. *Woodward* [78] and *Twine* v. *Bean's Express, Ltd.*[79]), it is clearly correct. If it means that a prohibition may limit the mode of performance it is clearly incorrect in view of *Limpus's Case* and the very case in which the words were uttered (although we may accept the distinction of the *American Restatement* between substantially similar and different instrumentalities). As was said by Lord Dunedin in *Plump* v. *Cobden Flour Mills Co.* (1914),[80] ' There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of performance '. Now it may be extremely difficult at times to say whether a prohibition goes to ' employment ' or to ' performance ', but this is unavoidable and need not be lamented unduly. Lord Tomlin also spoke [81] of ' absolute ' prohibitions that might have absolved the master, but what he really could have meant was, it is submitted, that the master had exactly defined what the servant was employed to do, and not that he had ' absolutely ' forbidden tortious misperformance.

SAMUEL J. STOLJAR.

[74] (1862) 1 H. & C. 526 at p. 539.
[75] [1942] A.C. 591. See Mr. Bora Laskin's excellent note, 18 Can.B.R. 205.
[76] § 239 is as follows: ' A master is not liable for injuries caused by the negligence of a servant in the use of an instrumentality which is of a substantially different kind from that authorised as a means of performing the master's service '.
[77] At p. 589.
[78] (1881) 6 Q.B.D. 318.
[79] (1946) 62 T.L.R. 155; (1946) 62 T.L.R. 458.
[80] [1914] A.C. 62, at p. 67.
[81] At p. 599.

FACTS AND ILLUSIONS

A Comment on Professor Schick's Article, 'International Criminal Law—Facts and Illusions'.

Professor Lauterpacht once remarked ruefully that the attitude of international lawyers to judicial settlement of inter-State disputes 'creates the impression of baffled acquiescence in an inherited evil'. The passage, together with some additional (though delicately measured) strictures on international lawyers, will be found at p. 435 of the *Function of Law in the International Community*. A similar baffled acquiescence seems to haunt the endeavours of certain learned writers to kill the Nuremberg trials. The latest example is the article entitled 'International Criminal Law—Facts and Illusions', published in the July issue of *The Modern Law Review*.

Volumes will be written about Nuremberg, but one important aspect can be isolated and put quite briefly. The critics make the stupendous, and shocking, assumption that there is nothing criminal in plotting to cause a world war leading to the death of millions. Let the plotters be captured because their conspiracy fails; still it is illegal to try them for aggression. They are innocent; the crime simply does not exist. Strictly speaking, the opponents of Nuremberg see no difference between a conference where Hitler orders a new gasworks for Berlin, and a conference where he declares (as he did) that 'there is therefore no question of sparing Poland, and we are left with the decision to attack Poland at the first suitable opportunity. We cannot expect a repetition of the Czech affair. There will be war'.

These fatal words were uttered at the secret meeting of May 23, 1939, and revealed at the trial. Objectors not only think them perfectly innocent, but get positively indignant because State leaders are put in the dock for aiding and abetting the war-lord in carrying them into practice four months later. This is an extraordinary attitude, all the more extraordinary because it comes from those whose task it is to expound and improve the infant science of international law. After all, people are getting, shall we say, a little worried about being wiped out en masse because someone decides to have a war. Inconsiderate of them, no doubt, especially when they are assured, by those whose business it is to know these things, that no one commits a crime in giving orders that invasion is to take place this day fortnight. It is not even as bad as riding a bicycle without a light. All that one can say is that if this really is international law it makes itself ridiculous. The savant sits and

listens to the hum of the aggressor's bombers, consoling himself with the reflection that everything is perfectly legal, and that murder ceases to be murder if done on a sufficiently big scale, but the general public will have another opinion, and persist in thinking that what is happening is a crime. Curiously enough, the public will be right, because in this case plain common sense happens to coincide with the law, the law declared at Nuremberg.

The fact is, of course, that conspiracy to commit aggression is a conspiracy to commit murder, and murder does not cease to be murder because it is done on a very large scale, and disguised under the term ' aggressive war '. There is a perfectly clear distinction between self-defence against an attack, and a deliberate cold-blooded planned aggression. Professor Schick raises all the learned difficulties he can think of to show that aggression cannot be defined, but in practice people know aggression when it occurs. If careful analysis is needed, the question was elaborately dealt with by Mr. Justice Jackson in his opening speech at Nuremberg (see pp. 81 and 82 of Vol. 1 of the Transcript). To come to the case in point, is there anyone who believes that Germany was not the aggressor? Granted this, what sacred magic is there about the word ' War ' to render the perpetrators immune from the usual consequences of murder and massacre? It is true that lawyers and statesmen have always tried to throw a cloak over war, so that acts, obviously criminal if committed by an individual gunman, somehow became guiltless and legal if done in war; but the time for this pleading finished in 1928, when the Briand-Kellogg Pact condemned recourse to wars of aggression. As was said at the trial, ' this pact altered the legal status of a war of aggression '. Hence, it seems beside the point for objectors to hark back to practices in pre-Kellogg Pact days, as though they still prevented us from condemning war and war-makers. The Pact radically changed the whole situation, shocking as this may be to those who cling to the idea that lawyers ought to hold their tongues in respectful silence where aggressive war is concerned.

Nor is there anything in the suggestion that wars of aggression are, somehow, not criminal, because the Statute of the Permanent Court does not refer to them. One is tempted to ask what on earth the court has to do with the subject. It is purely a civil court, entirely without criminal jurisdiction, and having no connection with penal law. To argue in that way is much as though one tried to prove that burglary is not a crime, because it cannot be tried in the county court.

The position was summed up at Nuremberg (Vol. 1, pp. 80 and 81) in the historic statement that ' Any resort to war—to any kind of war—is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal, and saves those lawfully conducting it from

criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequences of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war makers subject to judgment by the usually accepted principles of the law of crimes '.

The last part of this citation is quoted by Professor Schick at p. 295 of his article, but his answer to it is obscure. Elsewhere, he has said that such a doctrine never formed part of international law. Of course not. The question did not arise in the centuries before the Kellogg Pact made its fundamental alteration in the law. And why, one may ask, all this fuss and bother to prove that the Pact somehow or other did not really condemn aggressive war, and only had ' moral significance ', to use Professor Schick's phrase? Remarkable indeed if a solemn Treaty can be whittled down in that way! Certainly such an interpretation did not appeal to the court.

No one is going to underrate the enormous difficulties of saving civilisation by stopping war, but surely we are at least entitled to ask that international lawyers should cease from making the task still harder by arguments to prove that a treaty to outlaw war did not mean what it said, and that the distinguished Tribunal which held otherwise was wrong in so holding. Creative lawyers like Lord Mansfield or Chief Justice Marshall would have made short work of such objections.

Hector Munro.

Note

Mr. B. Plummer writes to point out that one passage in Dr. E. J. Cohn's recent article on ' Some Comparative Aspects of the Law of Landlord and Tenant ' ((1948) 11 Mod.L.Rev. 377, at p. 387), has unintentionally misrepresented the opinions expressed by Mr. Plummer in his own article ((1946) 9 Mod.L.Rev. 42, at p. 48). Mr. Plummer did not intend to apply the phrase ' a gross injustice ' to the rule that in the absence of express agreement the landlord was not liable to repair the demised premises. The phrase related to the rule that unless a tenant's covenant to repair was qualified by exception in the case of damage by fire or inevitable accident, the tenant was liable to make good the damage resulting from those causes.

STATUTES

THE CHILDREN ACT, 1948

THE coming into operation of the Children Act on July 5, 1948, was planned to coincide with the abolition of the Poor Law by the National Assistance Act, which came into operation on the same date, and automatically created the need for an alternative local authority to assume responsibility for destitute children; though the powers of the local authorities under the new Act are very much wider than heretofore. The Home Office had already become the sole central authority for children 'deprived of a normal home life' by the transfer to it of powers hitherto exercised by the Ministries of Education and Health. It is thus responsible for the oversight of services for both delinquent and neglected children (whether or not the latter have been brought before a juvenile court).

Every county and county borough council (in London, the London County Council) is required by the Act to set up a Children's Committee to carry out their functions under the Children Act, Parts III and IV of the Children and Young Persons Act, 1933 (relating to care or protection proceedings, reports to juvenile courts, provision of remand homes, places of safety, approved schools, etc.), the Adoption of Children (Regulation) Act, 1939, and the provisions relating to child life protection in Part VII of the Public Health Act, 1936 (Children Act, s. 39 (1)). This obligation may, however, be waived if the Secretary of State is satisfied that owing to special circumstances a particular local authority could discharge its functions better without setting up such a committee (s. 40 (1)). Every local authority must appoint a Children's Officer after submitting to the Home Office particulars of the name, age, experience and qualifications of the person whom it proposes to appoint (s. 41 (1) and (2)), and the Children's Officer must be assisted by an adequate staff (s. 41 (5)).

The effect of the foregoing is that the Children's Committee takes over the direct management of children's homes, reception centres or residential schools for which the public assistance committee was previously responsible, as well as any residential schools, remand homes and approved schools previously under the control of the Education Committee. It is also responsible for the selection of foster homes and the supervision of children boarded out in them, within the framework of the regulations made by the Secretary of State under section 14. It also has the duty of visiting children in voluntary homes (s. 54 (3)).

The primary duty of the Children's Committee is to 'receive into care any child under seventeen if it appears :

(*a*) that he has neither parent nor guardian or has been and remains abandoned by his parents or guardian or is lost; or
(*b*) that his parents or guardian are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or incapacity or any other circumstance from providing for his proper accommodation, maintenance and upbringing; and
(*c*) in either case, that the intervention of the authority under this section is necessary in the interests of the welfare of the child' (s. 1 (1)).

This care may continue until the child reaches the age of eighteen if his welfare so requires (s. 1 (2)). The local authority may not, however, continue to keep a child in its care under this section if the parent or guardian desires to take it over (s. 1 (3)). It will be seen that this first section is an extremely broad one deliberately designed to set practically no limits on the circumstances under which the local authority may assume the care of a child, but that there are no sanctions for detaining the child against the wish of the parent or guardian; indeed, it must actively seek (s. 1 (3)) for the care of the child to be taken over by parents, guardians, relatives or friends if this would be in the child's interests —in order, of course, to prevent this section being used as a means of evading parental responsibilities. This is entirely appropriate when it is realised that large numbers of children in the care of both local authorities and voluntary societies have parents or other relations who at some stage will be able to care for them, but who are temporarily or for a prolonged period unable to do so on account of illness in the home, the mother's confinement, lack of housing accommodation, the death of or desertion of the home by the mother, and a host of other reasons. In short, large numbers of these children are neither neglected, ill-treated, abandoned nor without parents or guardians, though they need care which their own relations are unable to provide. There is a duty on the parent (apparently not on the guardian) of a child in the care of the local authority to keep the authority informed of his address.

From this wide group of children there emerge certain who have no one to care for them or those who are unfit to do so. Consequently, under section 2, 'a local authority may resolve with respect to any child in their care . . . in whose case it appears to them—

(*a*) that his parents are dead and that he has no guardian; or
(*b*) that a parent or guardian of his . . . has abandoned him or suffers from some permanent disability rendering the said person incapable of caring for the child, or is of such habits or mode of life as to be unfit to have the care of the child,

that all the rights and powers which the deceased parents would have if they were still living, or, as the case may be, all the rights and powers of the person on whose account the resolution was passed, shall vest in the local authority'. There is no provision for

notifying anyone of a resolution made under (*a*), therefore it appears to be possible for a local authority by resolution to assume parental rights over an orphan child without notifying its relatives, if such exist. As regards a resolution made under (*b*)—

(1) the parent or guardian may consent in writing before the passing of the resolution;

(2) if this consent has not been obtained beforehand, the local authority must forthwith serve notice of the resolution on him in writing if his whereabouts is known;

(3) if within a month after the service of the notice the person concerned objects in writing, the resolution shall lapse within fourteen days, unless the local authority takes the case to the juvenile court within that time. The notice must inform the person concerned of his right to object to the resolution (s. 2 (2)).

Fears have been expressed that the rights of the parent or guardian are insufficiently safeguarded in that silence is taken to imply consent or indifference, whereas there is no guarantee that he will have received the notice (there is no obligation on the local authority to try to trace him if it does not know his whereabouts) or have understood its meaning. For these and other reasons some would have preferred a personal appearance wherever possible (preferably before a juvenile court) in every case of forfeiture of parental rights. If the parent or guardian serves notice of objection, then the local authority if it wishes to retain the resolution must within fourteen days complain to a juvenile court (s. 2 (3)). The resolution then remains in force until the conclusion of the case. The juvenile court may order that the resolution shall not lapse (in other words, they may confirm the assumption of parental rights by the local authority in spite of objection by the parent or guardian), but only if satisfied that ' the child had been, and at the time when the resolution was passed remained, abandoned by the person who made the objection or that that person is unfit to have the care of the child by reason of unsoundness of mind or mental deficiency or by reason of his habits or mode of life ' (s. 2 (2)). Such cases will presumably be heard in the same manner as care or protection proceedings under the Children and Young Persons Act, 1933. The reference to ' unsoundness of mind ' should be read in conjunction with the reference to ' permanent disability ' in section 2 (1) (*b*), as it will apparently only be possible for a local authority to pass a resolution where a parent or guardian is suffering from a mental disorder from which he is unlikely to recover.

The assumption of parental rights does not relieve any person liable to contribute to the child's maintenance from the obligation to do so (s. 3 (6), see also below). During the currency of the resolution, the local authority may permit the child to be in the care of a parent, guardian, relative or friend if this would be to the child's benefit. This is a sensible provision which enables such

desirable friends or members of the family as may exist to be given the care of the child (with a maintenance contribution if necessary) to the exclusion of others and with the sanction of removal if necessary (s. 3 (3)). A resolution may be subsequently rescinded by the local authority itself if this appears to be in the interests of the child (s. 4 (2)). It may also be determined by order of a juvenile court on complaint to the court by the parent or guardian. The court may also order, without revoking the resolution, that the child shall be for a fixed or indeterminate period in the care of the complainant (s. 4 (3)).

The consent of the local authority is no longer required to the making of a Fit Person Order under section 76 of the Children and Young Persons Act, 1933, though the court must consider any representations made by a local authority (s. 5 (1)).

Part II of the Act deals with children in the care of the local authority. It has a general obligation to exercise its powers in respect of such children so as to further their best interests, and to afford them opportunities for the proper development of their character and abilities (s. 12 (1)). This includes boarding them out with foster-parents, or maintaining them in a home, or, if over school age, in a hostel for boys or girls up to the age of twenty-one (s. 13). Local authorities may themselves provide such hostels. They may make grants towards the education and training (including maintenance) of young persons between eighteen and twenty-one who were in their care before reaching the age of eighteen (s. 20). They may also, with the consent of the Secretary of State, emigrate children in their care (s. 17).

The only persons now liable to contribute to the maintenance of a child under a Fit Person Order, an Approved School Order, or received into care under section 1 of this Act, are the father and mother of the child. This liability ceases when he reaches the age of sixteen, but he himself then becomes liable to contribute to his maintenance if he is in full-time paid work (s. 24). A local authority maintaining an illegitimate child in one of the three foregoing categories may apply for an affiliation order against the father if one has not already been made (s. 26).

All voluntary homes (including endowed homes) are now required to register with the Home Office (ss. 27 and 29). Voluntary homes which fail to register or which are not run in accordance with the regulations made by the Secretary of State may be closed, and the local authority may be required to receive the children in them into its care. The Secretary of State may make regulations governing the conduct of voluntary homes and the arrangements made by voluntary organisations for boarding out or emigration (ss. 32 and 33), and may also grant-aid voluntary organisations to improve the premises, equipment and staffing of their homes. Local authorities may also contribute to the funds of any voluntary organisation for the welfare of children (s. 46).

The Child Life Protection provisions of the Public Health Act, 1936, relating to children under nine placed with foster parents for reward, and the provisions of the Adoption of Children (Regulation) Act, 1939, relating to children placed by third parties in the care and possession of persons other than their parents, are extended up to the school-leaving age, or eighteen in certain cases (ss. 35 and 36). For the purpose of these sections a person receiving a guardian's allowance under the National Insurance Act or an allowance under the Family Allowance Act for a child, one or both of whose parents are dead, shall be deemed to be maintaining him for reward (s. 37).

For the purposes of the Act a child means a person under the age of eighteen. A guardian is a person appointed by deed or will or by the order of a competent court to be the guardian of a child. Parents include adoptive parents to the exclusion of the natural parents.

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THE NATIONAL ASSISTANCE ACT, 1948

THE first steps in the break up of the Poor Law were taken in the series of measures initiated by the Liberal Government of 1906, largely as a result of the recommendations of the Poor Law Commission. Compulsory insurance against sickness and unemployment, old-age pensions and the establishment of State-run Employment Exchanges all began between 1908 and 1912. Forty years later—in the years 1945–48—another burst of legislation marked what has been described as the final abolition of the Poor Law and the achievement of social security. The Family Allowances Act, the two National Insurance Acts, the National Health Service Acts, the Children Act and the National Assistance Act, together make up the scheme, though it is dependent for full success on other services such as education, housing and employment.

The National Assistance Act finally removes from local authorities the duty of giving cash allowances to those in need and transfers this task to the National Assistance Board, a centrally appointed and organised body. The process which began when the Unemployment Assistance Board was established in 1935 is thus completed and the unsatisfactory arrangements under which some categories of people draw allowances from the central authority —the Assistance Board—and others from the local authority—the Public Assistance Committee of the County or County Borough Council—is brought to an end. Another duty assigned to the National Assistance Board which was previously performed by the Public Assistance Committee, in so far as it was done at all, is the provision of Re-establishment and Reception Centres; the former

for refitting people for regular occupation and the latter for ' assisting and influencing persons without a settled way of living to lead a more settled life '. This polite way of referring to our old friend the vagrant who tramps the countryside, pushing his belongings in a dilapidated perambulator and sleeping in the open or, in bad weather, in the casual ward, may seem to some of us to show a rather naively optimistic outlook. But it may be hoped that the valuable work done for the younger wanderers by such bodies as the L.C.C. Welfare Office may be, through this section of the Act, carried on and further developed.

The abolition of the Poor Law carries with it the final disappearance of the policy of deterrence and also of the household means test, which had been considerably modified since 1941. The resources now to be disregarded in assessing means and needs are contained in the Third Schedule to the present Act and include the value of a house owned and occupied by the applicant, up to £375 of War Savings, a proportion of other capital up to £400, the first 10s. 6d. of various payments such as trade union sick pay and private superannuation and the first £1 from industrial or war injury pensions and National Insurance maternity or attendance allowances. The assessment of needs is made by regulations under the Act; those at present issued allow, for normal persons, 24s. a week for a single householder, 40s. for a husband and wife, with a sliding scale for other persons from £1 a week for an adult of twenty-one or over to 7s. for a child under five. To this is to be added a rent allowance which will be the net rent actually paid so far as is reasonable, having regard to the general level of rents in the district. The earning members of the household will be deemed to contribute up to 7s. a week, as under the Determination of Needs Act, 1941, but the level of earnings at which the full 7s. is payable is raised from 55s. to 70s. a week.

To the local authorities is left the duty of providing residential accommodation, both temporary and permanent, for all persons unable to manage for themselves, either by financing a voluntary organisation or by making the necessary provision. This part of the Act has captured the popular imagination, particularly in regard to old people; and the residential ' hotels ' where the aged are to be accommodated, paying a minimum of 21s. a week, having 5s. of their pension for pocket money, have been fully if non-realistically discussed in many sections of the Press.

A less glamorous but much needed reform is the requirement that all homes for disabled or aged persons must be registered by the local authorities and will be liable to inspection, both by them and by the Ministry of Health. Readers of the Nuffield Report on Old Age will know of the possible exploitation of the defenceless aged in so-called ' homes '.

Local authorities are also empowered, and to some extent

required, either by their own action or through voluntary organisations to make schemes for promoting the welfare of various categories of physically handicapped persons, blind, deaf and crippled. Some part of this welfare work is already carried on under existing statutes, such as the Blind Persons Acts, but with widely varying standards not only as between localities but as between the categories dealt with. The National Assistance scheme includes it as part of the general pattern for meeting needs. It may be hoped that a more uniform standard will result and that the interests of such groups as the deaf and the crippled will be more adequately catered for than at present.

Few people will lament the disappearance of the old Poor Law from the Statute Book, in law as well as in fact, and the substitution of a positive policy of relieving differential needs for a largely negative one founded on 'less eligibility'. But the effective application of the policy presents some difficulties.

There is much to be said for a National Assistance Authority instead of local Public Assistance Committees for issuing cash allowances. But the monetary assistance required will vary widely, not only with the persons to be relieved but also from place to place, and a very flexible and adaptable service will be necessary. There are advantages in a locally organised service to deal with locally variable problems.

The question of personnel presents a greater problem. The better the plan, the more demands it makes upon those who administer it; not only will more officers be required but they will, if the scheme is to be successful, have to be differently qualified and more carefully selected than is often the case now. There are indications that this need is realised and that efforts are being made to meet it, but with a shortage and maldistribution of man and woman power and inadequate training facilities the problem is a real one.

There are many other points arising from even a cursory survey of National Assistance; but the only one which there is space to consider here is the relation of assistance allowances to insurance benefits and to the wage level. With the present scales of assistance it is clear that many people drawing insurance benefits would also qualify for substantial supplementary help, particularly where they pay a high rent and/or have a large family. Social insurance thus is only a very partial provision for more or less normal emergencies and national assistance, far from being given in only exceptional circumstances, may be given in addition to ordinary benefits. The person who for any reason does not qualify for insurance benefits may again, with the present scales of assistance and needs, be entitled to a considerably higher allowance than he would draw if he had paid his fairly high contributions to the insurance funds.

The general increase in wages has reduced the problem of the 'wages stop' which arose during the depression of the nineteen-thirties when allowances were first given outside the Poor Law to

those no longer entitled to unemployment benefit. But even today the man mentioned above, with a large family or a high rent, may find that he draws in assistance and benefits not much, if any, less than his wages. Two points emerge from this. First, is the much discussed social insurance scheme, as put forward first by Lord Beveridge and made effective by the Government, really an insurance against want in any true sense? Secondly, what is the effect of the present scale of assistance allowances likely to be on the incentive to work?

It may be suggested that the assessment of needs should be altered or insurance benefits should be increased (and presumably contributions also) or wages raised to remove the possible disincentive of allowances. But all these expedients present difficulties possibly greater than those they may try to solve.

Rosalind Chambers.

REPORTS OF COMMITTEES, ETC.

REPORT OF THE ROYAL COMMISSION ON JUSTICES OF THE PEACE

THE Report of the Royal Commission on Justices of the Peace (July, 1948, Cmd. 7463) is everybody's business. Whatever may be thought about justices of the peace regarded as a modern institution they do at least represent a stubborn fact : they deal with 99 per cent. of the country's criminal business, a percentage which includes over 80 per cent. of the indictable offences charged ; they have jurisdiction on the civil side to some extent concurrent with that of each division of the High Court and much that is exclusive ; they have a developing appellate jurisdiction in disputes between citizens and local and other authorities [1] ; they administer the licensing laws almost without control by any superior tribunal.[2] They touch the affairs and liberties of more people at more points than does any other court of justice and this (if a truism may be forgiven) not by the exercise of cut-and-dried expedients, but according to the self-same principles of law which bind the highest tribunals of first instance.

From time to time, and particularly in recent years, public opinion is focused critically upon them and it is wholesome that they shall be subjected to authoritative scrutiny.

The Commission, presided over by Lord du Parcq, was appointed in 1946. A glance at the names of the people to whom the Royal Warrants were directed completes the assurance that they were competent to conduct the inquiry entrusted to them : the list of departments, organisations and individuals who gave oral evidence in public or submitted written statements is indication of the Commission's thoroughgoing approach to the task. Terms of reference, evidence and report extend over the whole field of appointment, removal, qualification and practice of justices of the peace, both lay and professional. The whole system has been on trial and judgment has been passed.

The Report examines exhaustively the appointment of justices of the peace by the Lord Chancellor,[3] acting on the advice of advisory committees set up in each county and each borough with a separate commission of the peace. It is largely, but not exclusively, on the advice of these committees that the Lord Chancellor

[1] For a recent illustration of this, see *First National Housing Trust, Ltd.* v. *Chesterfield R.D.C.* [1948] 2 All E.R. 658 ; 112 J.P. 413.

[2] For a recent illustration of this see *R.* v. *Pontypridd Licensing JJ., ex p. Ely Brewery Co., Ltd.* [1948] 2 All E.R. 581 ; 112 J.P. 396.

[3] In Lancashire appointments are made by the Chancellor of the Duchy of Lancaster. The Report, Lord Merthyr disagreeing, recommends that this shall continue.

makes about 1,100 appointments annually to maintain a numerical strength of about 19,000 lay justices. It is the duty of these committees to comb their areas for men and women 'of good character, of integrity, recognised to have a good reputation, of reasonable intelligence, and some of them rather young', and from time to time to submit names to the Lord Chancellor for consideration. Suggestions were made by some witnesses (not very forcefully, it may be noticed) that advisory committees should cease to be 'secret' but should sit as bodies publicly known and with responsibilities to the public at large: herein there seems to have been failure to recognise the large responsibility of the Lord Chancellor and the limited responsibility of people whom he sees fit to call to his aid. As the Lord Chancellor himself succinctly expressed it, 'I appoint the advisory committees and they are my committees and their job is to advise me'; a relationship which the Report says no word to disturb.

But informed opinion, while freely acknowledging that no improvement upon a system of advisory committees could be suggested, was at no pains to hide its unhappiness about present methods. The system, born of the recommendations of the Royal Commission of 1910, over which Lord James of Hereford presided, is defective in its workings in ways which its originators (somewhat ambiguously, as it appears), had expressly sought to avoid.

The aim is still (as it was in 1910) that 'the area of selection should be wide, and the choice comprehensive, so that the Bench may include persons of all social classes and of all shades of creed and political opinion'. The gravamen of the charge made to the Commission was that advisory committees are so constituted that the only net cast is the political one. This, it was represented, is a natural consequence of a system whereby nomination to the committee is made with an overriding desire to secure party-political balance and, with this end in view, each nominee, except that rarity the so-called 'independent' member, is subjected to a test of acceptability at political party headquarters. This system, many witnesses had cause to believe, leads members of advisory committees to regard themselves as representing the political parties to which they give allegiance, resulting in inter-party bargaining to secure the recommendation of ladies and gentlemen whom it is desired to reward for local political services to the exclusion of many whose claim for consideration is non-political. The Commission, in their majority Report, accept the view that the constitution of advisory committees lends colour to suggestions of this kind, even if the evidence falls short of proof that the abuses mentioned occur in fact. They recommend that advisory committees be given general directions setting out what the Lord Chancellor requires of them to secure that their nominations for appointment to benches are based upon the paramount consideration of a person's fitness

for the discharge of judicial duties. A memorandum of dissent by three members of the Commission is more forthright : no longer, they recommend, shall the Lord Chancellor have regard to the political affiliations of people whom he nominates to serve him as advisers. Thus, we find that the Commission is unanimous in diagnosing symptoms of a bad practice; the difference of opinion is whether attempt should be made to effect a cure by medical or by surgical methods. It is the affair of the Lord Chancellor himself to apply the cure, for the matter is entirely one of administrative practice : if the milder remedy is unavailing then the more drastic may need to be applied.

A hypothetical advisory committee is not the easiest of phenomena to observe. We would have liked the Commission to have taken at random several actual committees and, preserving their anonymity, attempted to discover by analytical examination how a selection according to one basis has correspondence with other possible bases of classification. The Lord Chancellor is first advised as to whom he should appoint to be members of his advisory committees : it would not have been outside the scope of the Commission's terms of reference to inquire into the manner in which the initial advisers have done their very important work. A known adherent of a political party is usually found to touch local life at many other points and it is occasion for some regret that opportunity was not taken to establish, as we believe it could have been, that many committees, well-balanced by design between the sexes and in age, residential distribution and political affiliations, are no less well-balanced among the several religious denominations, by occupational groupings, by non-magisterial, non-political social activities in which its members engage and, indeed, by whatever spread is taken. Party politics as a basis of division is not improper : it is imperfect; as would be any other single basis too rigidly applied.

There is no reason to suppose that an advisory committee, well-spread from many aspects, including that of politics, could not be typical; no reason to suppose that if politics were thrown through the window other accidental and more acceptable bases of classification would not come in by the door; no prima facie reason to suppose that, under proper direction, a well chosen committee would find difficulty in disengaging their thinking from ideas of political party representation.

Members of advisory committees are usually solid public-spirited people, intent upon doing their duty as they see it. It may be that they have seen their duty hitherto entirely in a political light and herein they have followed a course of error; but, with proper directions such as the Report recommends and with conscientious objective regard to their true purpose, they may be expected to recommend people, well-spread according to any other proper classification, of the qualities of mind and character the Lord

Chancellor seeks and is less well able to find by other means. In future, the Report recommends, they will have the help of a secretary who shall be publicly known as a channel of communication between the committee and the local community. Thus it is hoped to preserve all the advantages of a committee being 'confidential' as to membership and activity while removing the disadvantages inherent in operating as a 'secret society'. The secretary will take steps to make his identity as such widely known, to the end that two-way contact between the committee and what is described as the field of selection may leave nobody outside the range of the committee's vision.

It is expected and intended that the people appointed to the bench upon recommendations so advanced will seek instruction in the practical side of their judicial duties (the absence of this desire would seem to connote some lack of fitness for the office). The Report, with practical common sense, deals with the vexed question of instruction in the duties of the magistracy. It is accepted that any attempt to give lay justices an adequate knowledge of the extensive and complex law they have to administer would not usually succeed. The ideal is that they shall learn what is expressed in the term 'acting judicially'. The Lord Chief Justice, Lord Goddard, in his evidence had pointed out that justices are not reproved for being wrong in law, but that a failure to act judicially is a reason for censure. This, of course, is as it should be in a generation in which judicial work has been piled upon laymen with confidence more optimistic than logical that they could carry it. They have risen most nobly to the task, with good will, good sense and (in many cases) good training acquired at their own expense largely from publications sold in the bookshops or from correspondence courses. (They have, of course, had the help of their clerks; men of large experience in magisterial law and procedure who, with official blessing but little official help, and with no law to confirm them in their responsibilities, have played their not inconsiderable part in making it possible for lay justices to carry the heavy judicial burdens which the legislature has placed on their shoulders.)

The Report goes on to recommend that justices should also visit assizes and quarter sessions, prisons and other institutions, and study their proceedings and administration. Similar, more specialised, training is recommended for justices elected to serve on juvenile court panels. There can be no doubt that these proposals will have popular support; indeed, they have been anticipated over the last few years to an extent large but beyond the capacity of central organisation to measure.

Opinions were advanced in evidence that laymen recommended for appointment as justices should first be required to pass an examination. The suggestion was considered and dismissed as not feasible (so disappointing *The Times* leader-writer who had

envisaged the designation 'Failed J.P.' as a badge of modified status). But a suggestion is made that a new justice shall be given a short manual about his duties. We like to think of this long overdue suggestion as the mild insertion of the thin end of a most excellent wedge: perhaps the day will come when it is possible for the Treasury to provide all the 19,000 amateur judges, though some of them be not 'new', with a textbook acquainting them at least with the minimum knowledge which the superior courts require them to have, kept up-to-date with new editions issued as occasion requires: and, when considering the 'shortness' of the manual, some regard should be had to the fate of the quart poured into the pint pot. Already there are books on the market which answer the description 'short manual'; some of them so short as to be of little use.

Lay justices have long been athirst for the means of acquiring instruction in their duties: they have not been unaffected by recurring waves of criticism and have shown a wonderful readiness to respond to invitations to attend lectures, study-courses and discussion groups. The Report recommends that local schemes of instruction be drawn up by quarter sessions and borough benches in consultation with the Lord Chancellor's department and the Home Office. So be it. It will be a surprise to some readers of the Report that there comes now, for the first time, a suggestion that public money be spent in equipping the magistrates of each petty sessional division with a small lending library containing books from a list compiled by the Lord Chancellor's department and the Home Office.

We would have been glad to see the Report complete the matter of training in the duties of the magistracy with some recommendation concerning a most important branch of justices' functions, the administration of the licensing laws. The Report has much to say about the disqualification of justices for acting in licensing matters, but it is completely silent about any special qualification which might enlarge a justice's ability for this type of work. It is a surprising thing that lists of people are recommended for appointment to benches with no thought of suitability as licensing justices: yet it remains true that the magisterial machine will not work efficiently unless it sparks on all its cylinders. An advisory committee which ignores the special claims of people with minds well balanced on licensing questions and with ability to read a plan and to suggest structural improvements, fails in its duty. And a scheme of training which ignores licensing is that much short of complete.

The Report discusses at length the question of retirement of justices whether by removal from the commission or by ceasing to exercise judicial functions as is provided for in the Justices (Supplemental List) Act, 1941. There can be no question that a justice suffering from blindness, deafness or other physical infirmity which

unfits him for office should be requested, and if need be required, to retire. The difficulty is recognised in the Report that the person affected is usually less aware of his deficiencies than are the people around him. It is recommended that advisory committees shall review periodically the state of the benches with a view to steps being taken to lead to the retirement of justices who have become ineffective because of failure to attend or infirmity or other cause.

The age at which a justice, in the absence of other cause, should retire from active duty is set at seventy-five. This age is arrived at after an attempt to balance losses with gains: whatever age (within reason) is fixed for compulsory retirement, the country will lose magistrates whose mental and physical fitness is unimpaired, but against this must be set the importance of maintaining benches receptive of mind and fit of body. The Commission wisely decides that the retiring age of seventy-five be imposed by statute as a hard-and-fast rule, but recognises that the effect of its sudden application may leave some benches inadequately staffed by experienced justices : therefore it is recommended that for a transitional period of five years the Lord Chancellor should have a discretion to continue a justice in office beyond the retiring age. There has not been kept in the Lord Chancellor's office or elsewhere a central register of the names and ages of justices, but from statistics given in the Report, extracted from information which the Commission itself obtained, it is possible to calculate that about 2,000 justices of the peace spread over about half that number of petty sessional divisions in England and Wales are over seventy-five years of age; colour is lent to the impression that elderly justices are in larger proportion, by reason that more than one in five of chairmen of benches fall within this age group. Let there be no mistake : they have served their country well and will enter into retirement with honour.

Justices specially qualified for juvenile court work come under review : emphasis is laid on the need for ' men and women who have not merely a love for children, but a real appreciation of the surroundings and way of life of the type of child who most frequently finds his way into the juvenile court '. With this there will be general agreement as with the caution that it is ' not desirable that any person should be appointed a justice solely for sitting in the juvenile court '. It is our experience (a point which there is a present-day tendency to overlook) that the needs of the juvenile court require that law and welfare shall march together with law not behind. The proceedings are semi-private and much less rigid than in the adult court; but law modified must not be allowed to become law disregarded. It cannot be said too often that the degree of proof that a not over-clean and apparently neglected child committed a criminal offence (what the moderns prefer to call a ' delinquency ') is that which would be required in the case of an adult charged with murder; rather more, in fact, since the

protection of the presumption of doli incapax operates in favour of the child. The Report, by stressing the suitability of every justice for adult court work, discountenances the appointment of the type of people (of which all of us can find examples among our acquaintances) once described as 'men among boys : boys among men'.

The Commission carefully avoids defining the statutory phrase 'specially qualified for dealing with juvenile cases' but, drawing upon what experience we have, we would add to the quality mentioned above a judicial mind of extraordinary degree, maturity of outlook and large understanding, ease in conversation, and a rare quality of acceptability which finds a response in the child's parents and stirs them to positive thought and action.

These qualities are not always to be found par excellence in a single justice, nor need they be expected; but it is not too much to seek their presence in the three justices who normally constitute a juvenile court. (An advisory committee in search of the ideal juvenile court justice finds its task simpler if the search is directed to one who, with two others, will contribute what he has to the collective wisdom of the three.) It is satisfying that the Report does not follow the lead of enthusiasts in specifying and exemplifying (often, most immodestly, by reference to themselves) the nature of experience which a juvenile court justice ought to have. Haphazard selection is deplorable; but selectors of experience know that all the qualities which make a justice 'specially qualified for dealing with juvenile cases' frequently repose in unexpected breasts.

The Report is on sure ground in commenting on the ages of juvenile court panel justices. It is recommended that the most suitable age on first appointment is between thirty and forty, and certainly not over fifty : a justice should be required to retire from the panel when he attains the age of sixty-five. Information concerning members of juvenile court panels is entered in a central register which discloses that of those who have made known their ages, 2,706, or 38½ per cent. of the total number, outside London, are over sixty years of age (a division at the age of sixty-five is not made in this table), and of chairmen of juvenile courts 560, or 50 per cent. of the total, are over sixty-five (of this number eighty-four are over seventy-five years of age and one other is over eighty-five). Concerning the very large number over seventy-five, chairmen and others, the Report merely presents the Home Office explanation that 'sometimes good reasons are adduced for retaining the help of elderly justices either to give the benefit of their experience to younger magistrates recently appointed, or because they have special qualifications (*e.g.*, knowledge of medicine or, in Wales, of the Welsh language) or because they are specially active'. Of the greater number this may be so, and when they were last elected to the panels (two years ago) a case for their retention could, perhaps, have been made. But since then many younger people with

aptitude for the magistracy and minds devoted to public service have returned home after service in the forces and there can be few districts so completely impoverished as not to have them. The election by their fellows of some of these elderly gentlemen to the chairmanship of the panels is less easy to understand or to justify. The Report seeks to do neither, but, recommending that there be a requirement that a justice shall retire from the juvenile court panel at sixty-five, it seeks to minimise the upset occasioned by cutting out half of the members and a quarter of the chairmen, and goes on to recommend that for a transitional period of five years the Lord Chancellor shall have a discretion to continue a juvenile court justice in office beyond the retiring age.

There is a useful suggestion that the Home Secretary shall make fuller use of his power contained in the Children and Young Persons Act, 1933 (s. 45 and Sched. II) to combine two or more petty sessional divisions of small population for juvenile court work. Little use has been made of the power hitherto although it has not been uncommon to make such orders for the enlargement of probation areas. The Report notes that the re-organisation of petty sessional divisions recommended by the Departmental Committee on Justices' Clerks (1944, Cmd. 6507), if carried out, would achieve the desired result. The latter means, larger in application than the extension of juvenile court areas, would be more satisfactory, for there are other functions of justices (for instance, licensing administration) for which strong argument could be advanced that a thinly populated petty sessional division is too inconsequential a unit to function effectively.

The Report passes judgment on mayors, ex-mayors,[4] and chairmen of county and district councils (numbering about 1,800) who act as justices of the peace ex officio. It is recommended that the law touching these anomalous and temporary creations shall be repealed, except in the case of a mayor, to whom during his year of office special considerations apply.

The arguments, among others, are that chairmen of local authorities are elected without any consideration of their having displayed any qualities which indicate their fitness for the magistracy and, in any case, they are so well known in their neighbourhoods that they are more likely to have been passed over than unnoticed by the appropriate advisory committee. These arguments are logical and were accepted by the Commission; but it

[4] There are no ex-mayors acting as justices ex officio at the time of publication of this article. The Representation of the People Act, 1948, Sched. VI, para. 2 (3), continues a mayor, elected for a year in November, 1947, in office until the annual meeting of the borough council in 1949, but does not amend s. 18 (7) of the Local Government Act, 1933, by virtue of which a mayor continues to be a justice ex officio during *the year* next after he ceases to be mayor. Thus, by what is perhaps a legislative lapse, a gap occurs between November, 1948, and mid-1949.

is cause for slight regret that few voices were raised in evidence to uphold the existing system.

What might have been said to justify elected chairmen of local authorities being justices ex officio during their year of office? It could have been said that there is no substantial factual evidence that a tribunal which has included a justice ex officio has erred for that reason; nor is it likely that the nine permanent justices would be swayed to their undoing by the one ex officio (for these are the proportions). It could have been said that an advisory committee, however carefully chosen, might include a single member who nursed, perhaps unconsciously, a personal antipathy or prejudice, so preventing the unanimity which otherwise would have secured the appointment of one who enjoys the full confidence of the local community. It could have been said that a bench of magistrates is no worse for the tonic of having as a temporary member a responsible and partially detached observer. It could have been said (indeed, something of the kind was said) that a period as a justice ex officio gives opportunity to a person of high local standing to learn the work in anticipation of possible permanent appointment; so achieving, in a minority of cases, what a number of witnesses desired for all, a period of probationary service. It could have been said, in a minor key, that the public interest requires that the leader of a local community shall be enlarged in local dignity, not more completely to be accomplished than by calling him to administer the King's justice. All this, and probably more, might have been said but was not: judgment, to that extent, goes by default. We form no contrary judgment.

The Commission had regard to the special considerations which apply to the mayor of a borough, to whom the borough commission is addressed and who has 'had for centuries the special responsibility for the keeping of the peace in the borough; a responsibility ultimately dependent on his position as a justice'. It is recommended that a mayor shall continue to be a justice of his borough ex officio during his year of office but that his statutory right to preside over the justices should be restricted to formal and ceremonial occasions.

It is noticeable that in recent years many mayors, conscious of their deficiencies, have sat as justices without exercising their statutory right to preside, except perhaps on a single token occasion; there are many others, no less conscious of their deficiencies, who have presided against their strong personal inclinations but with stronger desire to maintain a tradition and to hand it undiminished to their successors; no doubt there are others who have been completely unconscious of any deficiency and whose exhibitions of vainglory have occasioned scandal. Few will be found to disagree with the wisdom of the recommendation that a mayor as such shall no longer be entitled to preside over the bench when sitting as a court of justice.

The chapter in the Report on stipendiary magistrates is of special interest, not least because of the fundamental disagreement expressed by Lord Merthyr with the recommendations of his colleagues. The majority Report is 'in complete agreement with the view expressed by the Lord Chancellor that, both on principle and on grounds of practical convenience, the present system ought to be retained' : Lord Merthyr, on the other hand, favours 'a gradual replacement of lay justices by stipendiaries'. He thinks it 'a question not of whether but of when lay justices should give way to stipendiaries'. An old controversy about which there is little new to be said! In England and Wales (outside London) there are sixteen stipendiary magistrates. The office is not usually one of perpetual succession but calls for the exercise afresh of local option whenever a vacancy occurs. The Report indicates, without being very clear on the point, that there has been a constant drop in the last seventy years : seven boroughs have not replaced departed stipendiaries; Manchester has reduced from two to one. At first glance the test seems to be one of population (as is proper) but this test does not bear close examination although it holds to the extent that stipendiary magistrates are generally to be found among the more populous boroughs. According to their position set in order according to population, the sixteen cities and towns in England and Wales which have, or are central towns of districts which have, stipendiary magistrates are : (1) Birmingham, (2) Liverpool, (3) Manchester, (5) Leeds, (6) East Ham and West Ham combined, (8) Kingston-upon-Hill, (9) Bradford, (10) Stoke-on-Trent, (16) Salford, (17) Cardiff, (23) Swansea, (28) Middlesborough, (29) Wolverhampton, (37) Huddersfield, with Merthyr Tydfil and Pontypridd rather a long way behind. Rather extraordinary omissions from the list, considered by reference to order of population are : (4) Sheffield, (7) Bristol, (11) Newcastle-on-Tyne, (12) Nottingham, (13) Portsmouth, (14) Leicester, (15) Croydon, (18) Plymouth, all of which have populations over 200,000. No ascertainable test explains why one town should desire a stipendiary magistrate and another not, and the Report rightly concludes that the determining factor is the course of past history. Herein it may be observed that there have been appointments in the past of men who have not brought honour or even ability to their profession : their reputations have lived after them to retard the growth of the stipendiary service. The question of removal and replacement is no less pressing than as it touches lay justices : to be certain that every stipendiary magistrate to be appointed hereafter will be excellent is yet another triumph of hope over experience. It is very important to create in every stipendiary magistrate's mind the feeling that he is completely independent; but no less important, as one witness wisely said, that there be created the feeling among the public that he is completely efficient. The Lord Chancellor testified his inability to find at present enough stipendiary magistrates

for the creation of an efficient country-wide service—'If you ask me to find 500 men, and that is the sort of number that would be required, who are competent to act and who would do this work as well as the magistrates of today, then I tell you I cannot possibly do it and, therefore, the question is an academic one so far as I am concerned. Frankly, I would be sorry to do it even if I could. I think it is an excellent thing that justice should be administered by the ordinary lay people, but, quite apart from that, the other difficulty is absolutely conclusive: I cannot find the people; and therefore that solution is an impossible one'. The Commission, with one dissentient, agreed with this statement and recommend that the present system of relying largely upon a lay magistracy shall continue. The suggestion of the Bar Council of a system of circuit stipendiaries designed to sit with lay justices and to take difficult cases was approached with realism and found not to have great merit. Instruction can be imparted in other and more acceptable ways: cases of difficulty rarely signal their approach; indeed, a glance through any volume of reported cases shows at once that it is usually in the most 'ordinary' cases that lay justices are found to have gone wrong in law.

It is recommended that in connection with the appointment of a stipendiary magistrate the principle of local option shall continue, but that if the Lord Chancellor is satisfied from representations made to him that a prima facie case exists for the appointment of a stipendiary magistrate he should, after inquiry, be empowered to make it from barristers or solicitors of seven years' standing. This is far-sighted: the bench of lay justices which seeks not to have the assistance of a stipendiary magistrate is put on its mettle to maintain the highest standard of efficiency. It is perhaps good at this point to expose the not uncommon double fallacy contained in contrasting the stipendiary magistrate who knows everything with lay justices who know nothing. This, of course, is sheer nonsense and a prolific source of muddled argument. In a masterpiece of concise statement the Report commends the present system 'because, like that of trial by jury, it gives the citizen a part to play in the administration of the law. It emphasises the fact that the principles of the common law, and even the language of statutes, ought to be (as in the case of the common law at least, they certainly are) comprehensible by any intelligent person without specialised training. Its continuance prevents the growth of a suspicion in the ordinary man's mind that the law is a mystery which must be left to a professional caste and has little in common with justice as the layman understands it. Further, the cases in which decisions on questions of fact in criminal cases are left to one man ought to be, as they now are, exceptional. It must be remembered that even a judge of the High Court is never asked to undertake the heavy responsibility of trying a criminal

case except with the assistance of a jury of laymen, to whom alone is left the decision on the facts '.

The salaries of provincial stipendiary magistrates (unlike Metropolitan magistrates) are paid out of local funds : their fixing and variation being matters for debate in the local council chamber. This anomaly gives rise to much resentment and embarrassment to holders of the office (possibly the discomfort attendant upon seeking an increase is some explanation of the shockingly low salaries paid). Few are covered by superannuation schemes. It is recommended that the duty of fixing salaries be placed on the Lord Chancellor, and that there be paid, on retirement, a non-contributory pension.

A most sensible, and long over due, suggestion is made that where it is not possible for a local bench to deal with a case without embarrassment, as, for instance, when a justice or the clerk is charged in his own division with a criminal offence, the Lord Chancellor shall be empowered to appoint a county court judge or a recorder or some other person having the qualifications of a stipendiary magistrate to sit for the occasion, if need be, with one or two justices nominated by the Lord Chancellor.

Altogether, the Report is a noteworthy document; produced after informed and painstaking investigation of a system of courts of inferior jurisdiction, ancient in origin but capable of keeping abreast with the needs of a changing England. The process of self-adaptation to modern requirements has been going on, too slowly but none the less surely, until the time has come when encouragement and help must issue from the central authority. The setting up of the Royal Commission was approved by everybody; its constitution and terms of reference gave general satisfaction; its Report gives the encouragement and recommends the help of which the service is in urgent need. The theme of the Report is that lay justices have a future as well as a past.

James Whiteside.

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W. A. Steiner.

NOTES OF CASES

MISTAKE AS TO IDENTITY

'Consider, sir, the hardship of this interesting case.'
—W. S. Gilbert (Bab Ballads).

We are so accustomed to seeing the fraudulent obtainer of goods using the shop, the office or the post office as the scene of his activities that we may well raise a curious eyebrow when he resorts to the auction rooms. Between the fraud and his dupe there is usually a certain intimacy of relationship which, at any rate as regards the former, is in the literal sense agoraphobic. But in *Dennant* v. *Skinner* [1948] 2 All E.R. 29, one, King, was not altogether true to type. He attended an auction sale at which the plaintiff, an auctioneer, sought to dispose of thirty-five vehicles in a room containing about a hundred and fifty prospective buyers.

The plaintiff knocked down one vehicle to the highest bidder and asked his name. The bidder replied that his name was King, son of the proprietor of King's Motors of Oxford—a well-known and reputable concern. The same bidder bought five more cars, including a Standard saloon car. After the sale, King said that he would like to pay by cheque. The plaintiff replied that it was not his practice to accept cheques from people he did not know. King then repeated his representations as to his connection with King's Motors and produced a cheque book, the counterfoils in which indicated that he had paid large amounts to well-known auctioneers. The plaintiff then accepted King's cheque, but, with what proved to be useless caution, persuaded King to sign a document in the following terms :—

> 'I hereby certify my cheque No. ..... will be met on presentation at my bank. Furthermore, I agree that the ownership of the vehicles will not pass to me until such time as the proceeds of my cheque have been credited to South London Motor Association account at Lloyds Bank.'

King was then allowed to remove the vehicles.

King's cheque was not honoured and he was later convicted of obtaining the vehicles by false pretences. He had sold the Standard car to C, who then sold it to the defendant, an innocent purchaser, from whom the plaintiff now sought the return of the car or its value.

The plaintiff relied on three grounds to support his claim :—

1. The transaction which led to King having possession of the car amounted to larceny by a trick.

Of course, King's conviction for obtaining by false pretences did not bind the court. Hallett J. pointed out that, however much the

distinction between false pretences and larceny by a trick has diminished in importance as a result of the Larceny Act, 1916, s. 44, it is still of vital importance in this class of case. The learned judge cited with approval the following passage from the judgment of Fry J. in *Smith* v. *Wheatcroft* (1878) 9 Ch.D. at p. 230 :—

> 'Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract and I should have been equally willing to contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.'

At an auction sale, apart from any question of reserve price, a lot is usually knocked down to the highest bidder, whoever he may be. Moreover, in the present case, it was clear that up to the time of the fall of the hammer the auctioneer was not concerned with the identity of the highest bidder. The evidence showed further that the mention of his identity was made only, in the ordinary way, for the purpose of completion of the auctioneer's memorandum. There was, therefore, no question of error as to the other contracting party up to the moment when the contract was made. Indeed, the contract was made before any misrepresentation by King occurred at all.

Hallett J. had considerable doubt whether the conditions of sale had been brought to the notice of the bidders so as to incorporate them into the contract of sale. The conditions provided, inter alia, that the entire purchase-money should be paid before the lots were removed on the day of sale, and that cheques tendered in payment would not be accepted unless satisfactory references were given. Neither of these conditions affected the issue; they dealt with performance of the contract by the buyer and not with the making of the contract or with the passing of property.

King's misrepresentation, then, did not induce the contract. Subject to what will be said hereafter as to the passing of the property in the goods, it only induced the plaintiff to part with possession of the goods.

The learned judge considered that the case was indistinguishable from *Phillips* v. *Brooks, Ltd.* [1919] 2 K.B. 243. The correctness of this decision has been questioned, *e.g.*, by the editor of Anson's *Law of Contract*, and by Professor Goodhart (57 L.Q.R. 228). In *Lake* v. *Simmons* [1927] A.C. 487, Lord Haldane suggested that the case could be explained on the ground that the fraudulent

representation was not made until after the parties had agreed upon the sale. To that Professor Goodhart replies :—

> 'There is, however, nothing in Horridge J.'s judgment (in *Phillips* v. *Brooks*) to give any ground for supposing that this ingenious and unrealistic explanation was the one on which the learned judge reached his conclusion. Instead of attempting to distinguish the case in this subtle manner, it would have been more convenient if Lord Haldane had stated that he thought the case had been wrongly decided. Did the shopkeeper believe that he was entering into a contract with Sir George Bullough and did North know this? If both answers are in the affirmative then it is submitted that there was no contract.'

He then cites *Hardman* v. *Booth* (1863) 1 H. & C. 803. There the plaintiff called at the premises of Gandell & Co., where he met Edward Gandell whom he mistakenly believed to be a member of the firm. Edward Gandell ordered goods which he later pledged to the defendants, whom the plaintiff sued in trover. The Court of Exchequer held that although Edward Gandell was the individual with whom the conversation took place, the plaintiff supposed that he was dealing with Gandell & Co. There was no dealing with Edward Gandell personally. Professor Goodhart concludes that this case disposes of *Phillips* v. *Brooks* :—

> 'If A falsely says that he is the agent of B, there is no contract with either A or B, even though A has negotiated in person. It would seem to follow that the same rule ought to be applicable in the even stronger case where A says that he is B, and the contract is entered into on that understanding. It is therefore submitted that *Phillips* v. *Brooks* was incorrectly decided.'

Be that as it may, none of these arguments can affect the case we are now considering. They affect only the making of the contract. In our case the contract has been made before any problem of error or misrepresentation appears on the scene. Lord Haldane's version of *Phillips* v. *Brooks* is therefore applicable.

2. The property in the circumstances did not pass until the price was paid by the cheque being in order or cash substituted for it.

The Sale of Goods Act, 1893, s. 58 (2) provides that at an auction the contract is concluded on the fall of the hammer.

By section 18, Rule 1, unless a different intention appears, 'where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed '.

It follows that in this case the property in the car passed to King unless the contract was conditional or unless a different intention appeared. The learned judge found no evidence of either exception. He drew a distinction, however, between the passing of property and the right to possession, because the seller of goods

has certain rights to retain possession, even though the property has passed, until payment is made.

> 'But once he chose, for reasons good, bad or indifferent, as a result of statements fraudulent or honest, to part with possession, he no longer had a right to possession. So his right to property had gone and also his right to possession.'

In passing, we may note that the seller's lien can probably be revived where he parts with possession through the buyer's fraud. (See, *e.g.*, *Wallace* v. *Woodgate* (1824) 1 C. & P. 575, and *Re Tunstall & Cash, ex p. Bell* (1847) De G. 577.)

3. The document signed by King contemplated that the ownership of the vehicle had not passed to him.

On this point, the learned judge, after reiterating that the property had passed to King on the fall of the hammer, said :—

> 'If subsequently the bidder executed the document acknowledging that the ownership of the vehicle would not pass to him, that could not have any effect on what had already taken place. Accordingly, the only way it seems to me in which this document could be used to satisfy the plaintiff's argument is to find that it had the effect of divesting the property from King and revesting it in the plaintiff, the seller. I do not think that such a view of the document is sound.'

It is submitted, however, that the document could well have been construed as an agreement to revest the property in the vehicles in the seller until the cheque was honoured. In effect, the purchaser is saying : 'In consideration of your allowing me to have the possession of the vehicles, I agree to give you back the property in them until this cheque is met'.

Raphael Powell.

IMPLIED CONDITION—EXEMPTIVE CLAUSE

Cases on sale of goods are so few and far between that when litigation arises on a sale of goods contract it is noteworthy if only for its comparative rarity. The recent case of *Champanhac, Ltd.* v. *Waller, Ltd.* [1948] 2 All E.R. 724, presents us with a set-piece on implied conditions and their attempted exclusion by means of an express term in the contract.

The vendor, in pursuance of an offer to sell a quantity of surplus government balloons, showed to the purchaser a sample which the latter found to be strong and merchantable. Whereupon, the purchaser accepted the offer for the purpose, as the vendor knew, of re-selling the balloons at a profit. The concluded contract was reduced to writing to the effect that the goods sold were 'as sample taken away' and that it was 'distinctly understood that these are government surplus goods and we sell them to you with all faults and imperfections'. On delivery of the balloons it was discovered that the material was perished and unmerchantable. The

purchaser did not, however, reject the goods, but accepted them (within the meaning of section 35) and sued the vendor for damages for breach of warranty.

Slade J. was confronted with a primary issue of construction. Did the words quoted relieve the vendor of his prima facie liability for breach of the implied condition that the bulk would correspond with the sample in quality (section 15)? The line of cases from *Baldry* v. *Marshall* to *L'Estrange* v. *Graucob* has sharply revealed the court's imperative and unbending demand for utter precision and efficacy in exemptive clauses of this kind before it will strip a purchaser of the protection that the Act affords him. This powerful rendering of the interpretative principle that words are to be construed against the person who uses them, underlay (it is respectfully submitted) the view that the learned judge took of the ambiguity inherent in the clause at issue. It might have meant that the purchaser agreed to take the risk of whatever faults and imperfections might turn out to be in the bulk delivered. On the other hand, it might equally have this sense, that, provided the bulk corresponded in type and quality with the sample, the purchaser would overlook any *other* faults and imperfections present in the bulk.

The learned judge favoured the second interpretation, from which flowed the following legal consequences : there had been a breach of implied condition (section 15), reduced here to the level of an *ex post facto* warranty by acceptance (section 11 (1) (*c*)); damages for breach of warranty were assessable in accordance with the rules in *Hadley* v. *Baxendale*. Hence, £250 would be awarded in respect of the difference in value between the goods as delivered and the goods as warranted, together with an additional £150 for loss of the profit which had been within the reasonable contemplation of the parties at the time the contract was concluded.

C. GRUNFELD.

'BENHAM *v.* GAMBLING' DAMAGES

THE facts in *Hart* v. *Griffith-Jones* [1948] 2 All E.R. 729, were that, on November 17, 1946, a little girl of four lost her life by reason of the negligent driving of the defendant. Her father, as administrator of the estate, was claiming two particular items of damages : first, *Benham* v. *Gambling* damages for 'loss of expectation of happiness', and, secondly, funeral expenses under section 1 (2) (*c*) of the Law Reform (Miscellaneous Provisions) Act, 1934.

In *Benham* v. *Gambling*, the House of Lords handed down a directive to the effect that damages in respect of loss of life should be moderated and assessed in hundreds instead of in thousands, as previously. It was a 'directive' rather than a satisfying set of principles because, apart from some natural deficiency like lunacy,

imbecility or incurable invalidism, the factors which would normally be taken into consideration in estimating a person's loss of expectation of happiness were expressly excluded from consideration. The simple deflation of such damages was seemingly the substantial purport of the decision.

Before *Benham's Case*, the judges had already begun, by a process of reasoned comparison, to construct a clear scale of pecuniary awards in cases of this type; it is true they differed as to underlying legal principles, but to determine these was perhaps an impossibly difficult task in any event. After the decision, it was to be hoped and expected that a new scale would be built up, calibrated this time in hundreds only; and, indeed, the broad outline of such a scale had taken shape. It ranged from £0 to the £500 awarded by Atkinson J. in *Garcia* v. *Harland & Wolff, Ltd.* [1943] 2 All E.R. 477, which involved the death of a workman twenty-seven years old. 'He had settled prospects, good health, and the valuable industrial knowledge of an expert worker. He had a wife whom I had the pleasure and advantage of seeing, and the evidence was that they were very happy together, and they had two small boys. I cannot help feeling', the learned judge went on, 'that counsel for the plaintiff was right when he said that I have to deal with a case where really the maximum damages that could ever properly be given, should be given . . .' (at 486). Between these two points came the £200 given in *Benham's Case* itself. Other intermediate calibrations awaited the result of future cases.

The most important practical question in *Hart* v. *Griffith-Jones* was the numerical alterations required in this scale by reason of the downward movement of the value of the £ sterling since the war. Streatfeild J. took the new monetary level into account in giving £200 as damages under this head, but omitted to divulge the nature of the comparative basis for his calculation. Whilst every lawyer must sympathise with the profound difficulty the learned judge had encountered in this vital problem of economics that is the subject of disagreement among the economic experts themselves, one cannot help deploring the fact that previous assessments seem now in process of being rendered so much waste paper and that a scale has to commence being beaten out once again in the slow forge of litigation.

Under the second head of damages, the learned judge declared established legal practice when he said, 'I must be guided by what is reasonable' (at 731). Embalming of the body was reasonable, but the erection of a monument for £225 was plainly not. On the other hand, the category of what is reasonable would appear to include the setting up of an ordinary stone or tablet on the grave. As matter of topical interest, it may be noted in conclusion that, had the accident occurred on or after July 5, 1948, the child's father

would not only have recovered funeral expenses, as statutory damages, but would, in addition, have been entitled to receive the 'death grant' of £10 under section 22 and Schedule II, Part II of the National Insurance Act, 1946.

C. GRUNFELD.

WIFE SUING HUSBAND FOR ANTE-NUPTIAL TORT

IN his article on 'The Legal Unity of Husband and Wife' (10 M.L.R. p. 16, at p. 27), Professor Glanville Williams states that the rule allowing no action in tort between spouses 'works extremely badly', and cites as one illustration the case of *Gottliffe* v. *Edelston* [1930] 2 K.B. 378, 'where the rule operated to protect the husband's insurance company'. This case has now been overruled by the Court of Appeal in *Curtis* v. *Wilcox* [1948] 2 All E.R. 573.

The facts in both cases were 'in all material respects similar'. The plaintiff, while travelling with the defendant in his car, was injured in an accident caused by the defendant's negligent driving. Subsequently she married the defendant, and the question arose as to whether she could sue the person who was now her husband for damages for personal injuries, *i.e.*, whether she could sue him for an ante-nuptial tort. It was admitted in both cases that the defence was being conducted in fact by the insurance company with whom the defendant was insured in respect of road accidents.

In reviewing the present decision, it is convenient to recall the argument and judgment in *Gottliffe* v. *Edelston*.

The plaintiff's contentions in that case may be stated as follows: (1) the negligence of the defendant before the marriage gave the plaintiff a right of action against him; (2) this was a 'thing in action', and therefore, by virtue of section 24 of the Married Women's Property Act, 1882, should be regarded as a right of property (that section states that 'The word "property" in this Act includes a thing in action'); (3) when the defendant married the plaintiff, this 'thing in action' became her 'separate property' within the meaning of section 2 of the Act; (4) by section 12 of the same Act the plaintiff was entitled to enforce the action against the defendant 'for the protection and security' of that separate property.

The decision in *Gottliffe* v. *Edelston* turned on the validity of the second contention of the plaintiff, that the ante-nuptial cause of action was a 'thing in action' and therefore 'property' within the meaning of the Act. McCardie J., giving judgment, was of the opinion that a 'thing in action', when regarded in the broadest possible sense, included a right of action in tort. But he considered that the phrase was not used with 'so extremely an extended meaning' in section 24 of the 1882 Act. If it were so used in this broad sense, 'the consequences would be striking'. Although

no husband could sue his wife for any tort whatsoever committed by her against him, ' yet the wife (could) sue the husband for every act of tortious wrong against her before marriage, whether it be for negligence, libel, slander or assault '. This would be a remarkable result, which he felt bound to avoid if possible. So, having characterised the 1882 Act as ' ambiguous and obscure ', he felt obliged to embark on a lengthy consideration of ' legal history, of theological influence, of ambiguous decision, and of obscurely worded legislation ', and then to interpret the relevant sections in the light of the general policy of the Act. He thought it was plain that the framers of the Act did not wish to encourage litigation between spouses, which was ' unseemly, distressing and embittering '. He decided therefore to read the phrase ' thing in action ' in section 24 of the Act in a limited sense only, so as not to include a right of action in ' pure tort ' in respect of the wife's personal safety and security.

The decision in *Curtis* v. *Wilcox* turned on exactly the same point. The Law Reform (Married Women and Tortfeasors) Act, 1935, has not affected the issue, except in so far as the word ' separate ' with regard to a married woman's property may now be disregarded. Despite the fact that McCardie J.'s view met with the approval of Hallett J. in *Chant* v. *Read* [1939] 2 K.B. 346, 358, the Court of Appeal, in a judgment delivered by Wynn-Parry J., have now held that *Gottliffe* v. *Edelston* was wrongly decided. They are in agreement with McCardie J. that a right of action in tort constitutes a ' thing in action ', finding support for this view in the judgment of Jessel M.R. in *Re Park Gate Waggon Works Co.* (1881) 17 Ch.D. 234, 239. ' The question, therefore, remains whether McCardie J. was correct in his view that " thing in action " as used in the Married Women's Property Act, 1882, has the limited meaning which he attributed to it '. They consider that there is no ambiguity, and that section 24 makes it ' clear beyond doubt ' that a wife's personal property includes her things in action. There is, in their view, ' no ground to be discovered . . . for holding that " thing in action " is used . . . in any limited sense ' in the Act. In the result, the plaintiff's claim succeeded, and insurance companies are no longer protected by virtue of the marriage of plaintiff and defendant.

So we have arrived at the ' striking consequence ' which McCardie J. was loth to sanction, namely, that whereas a wife can sue her husband for torts committed against her before marriage, ' whether it be for negligence, libel, slander or assault ', she cannot sue for such personal wrongs committed during marriage. The Court of Appeal state that the common law rule would still apply to ' prevent a married woman from pursuing a purely personal claim against her husband, *e.g.*, for damages for libel or slander or assault ', and consider that the express mention of the common law rule in the section creating an exception to it (section 12) serves

only to emphasise the rule. Of course, a married woman may still sue her husband 'for the protection and security' of her property, but this, as *Ralston* v. *Ralston* [1930] 2 K.B. 238, shows, is of limited application. The decision in *Curtis* v. *Wilcox* rests entirely on the plain meaning of the relevant sections of the 1882 Act, and no consideration of the policy of the Act or of the law with regard to married women was necessary. However, now that rights of action for ante-nuptial torts will no longer be extinguished *per subsequens matrimonium*, we may perhaps be permitted to wonder whether, as a matter of policy, all such rights of action in tort ought to survive marriage. Possibly some rights of action, for instance defamation, should be excluded 'as a matter of policy', because such actions between husband and wife are 'unseemly, distressing and embittering'. (Defamation is already excluded from the survival of causes of action after death.) An alternative course would be to reaffirm the law as stated in *Gottliffe* v. *Edelston*, but allow an exception where the liability is one which is the subject of compulsory insurance, as in road accidents, so as to enable a spouse to sue in such cases.

E. HALL WILLIAMS.

DEFAMATION—INTERROGATORIES AS TO SOURCES OF INFORMATION AND BELIEF

IF the recommendations of the Committee on the Law of Defamation, with regard to the abolition of 'Elliott & Garrett' and 'Plymouth Mutual' Interrogatories, are put into effect, cases like *Lawson* v. *Odhams Press, Ltd.* [1948] 2 All E.R. 717, will no longer arise. Such interrogatories as to the sources of information and belief are used in cases where privilege or fair comment is pleaded, in the hope that the replies received will be relevant to the issue of malice. They add considerably to the cost of litigation in cases of defamation, and the Porter Committee felt quite justified in recommending their total abolition.

In this case, the plaintiffs sought to administer 'Plymouth Mutual' Interrogatories to H., the writer of a signed article in one of the defendants' newspapers, the defendants having pleaded fair comment. H. was at all material times in the exclusive service of the newspaper. Jones J., on an appeal from the Master, disallowed one of the interrogatories, and the plaintiffs challenged his decision in the Court of Appeal.

There was already a rule of practice which precluded the administration of such interrogatories to the proprietor or publisher of a newspaper, and the question was whether this extended to protect a newspaper's servant. In one case, *South Suburban Co-operative Society, Ltd.* v. *Orum* [1937] 3 All E.R. 133, the administration of such interrogatories was allowed to a member of the public who

wrote a letter published in the correspondence columns of a newspaper, and the plaintiffs contended that the present case was on all fours with this.

The decision of the Court of Appeal was that it was open to the judge, ' recognising the existence of this practice in the cases of the proprietors and publishers of newspapers ', to hold as a matter of discretion that the administration of an interrogatory to a person in the position of H. should be disallowed. Furthermore, as the judge had given no reasons for his decision but had apparently quite properly treated the matter as one of discretion, his action would not be disturbed in the absence of evidence that he did not in fact exercise his discretion judicially, or that he erroneously considered himself bound by some rule of law. The appeal was therefore dismissed without expressly deciding whether the rule of practice was to be extended to cover persons in the position of H.

E. Hall Williams.

MISFEASANCE AND NON-FEASANCE

In *Cowley* v. *Newmarket Local Board* [1892] A.C. 345, the House of Lords re-affirmed the ancient rule that a highway authority is liable for injuries caused by a breach of its statutory duty to keep the highway in a fit state of repair if the breach of duty is one of misfeasance but not if it is one of non-feasance. Since then, it has been impossible to question the legal validity of the doctrine of non-feasance; and although in recent years the courts have shown their dislike of the doctrine by refusing to apply it where an authority has omitted to remove defective traffic studs and disused tramlines from the highway, two cases decided in the last few months have shown that it is still vigorous enough to inflict flagrant injustice. In *Chappell* v. *Dagenham Corporation* (1948) 46 L.G.R. 388, the plaintiff was injured by falling over a metal ' street box ' installed in a pavement by an electricity company. The pavement around the box had worn down and the accident was caused by the consequent protrusion of the box. Jones J. held that the case was on all fours with *Thompson* v. *Brighton* (*Mayor of*) [1894] 1 Q.B. 332, so that the doctrine of non-feasance applied. In *Wilson* v. *Kingston-upon-Thames Corporation* [1948] 2 All E.R. 780, a cyclist was thrown through riding across a shallow hole in the road surface. Temporary repairs had been executed at the spot some time previously, but the surface had worn down again. Counsel for the plaintiff, quoting a dictum of Lord Parker to the effect that statutory powers had to be exercised with reasonable care, submitted that this was a case of misfeasance since the defendants had been at fault in failing to ensure that the repairs would be lasting and effective. Morris J. rejected this submission; had he accepted it a

blow would have been struck at the roots of the doctrine of non-feasance.

No doubt many other unfortunate road-users injured by similar causes have refrained from taking legal proceedings. The present state of the law has been frequently criticised from the bench, and in 1939 the Alness Committee on the Prevention of Road Accidents described it as 'a curious anomaly'. In the present writer's experience, the comments of laymen when first acquainted with the situation have been less decorous. It is suggested that when parliamentary time is available for reforms of substantive law, it might profitably be employed in abolishing this indefensible immunity.

S. A. DE SMITH.

REPEAL OF STATUTORY DEFINITIONS—POWERS OF PUBLIC CORPORATIONS

TWO recent cases are concerned with interesting and, it appears, novel points of statutory interpretation.

In *Chapman* v. *Kirke* [1948] 2 All E.R. 556, a Divisional Court of the King's Bench Division had to deal with the difficult problem which arises when a technical term used in an unrepealed section of a statute has been defined in a repealed section and nothing has been put in the place of the repealed definition. An electric tramway car was held to be a 'stage carriage' within the meaning of section 48 of the Stage Carriages Act, 1832, and its driver was held to have been properly convicted under that section for injuring the property of the owner of a 'stage carriage' on the ground that, by his negligence, he had caused a collision between his employer's tramcar and a lorry. The term 'stage carriage' had been defined in section 5 of the Act of 1832, but the definition section had been repealed by the Customs and Inland Revenue Act, 1869. Counsel for the defendant argued that 'the definition being repealed, a man cannot be prosecuted as the driver of the stage carriage because there is no means of showing what a stage carriage is'. But, as the Lord Chief Justice pointed out, the term 'stage carriage' is 'an ordinary expression of the English language' capable of being defined without the assistance of a statute. Hence, the repeal of the statutory definition had the effect of enabling the court to give the term its customary meaning. The ratio decidendi of the case is clearly applicable only to such terms as have an intelligible significance apart from their use in a statute.

What happens if a technical term has no such customary significance and the definition which alone makes it intelligible has ceased to be law? Denning J. (as he then was) may have had such a situation in mind when he said that he did not 'wish it to be supposed that when a section of an Act is repealed it cannot

thereafter be considered when other provisions of the Act fall to be interpreted'. That this question is far from academic, is shown by a problem concerning a number of statutory provisions with which Vaisey J. was confronted in *Smith* v. *London Transport Executive* [1948] 2 All E.R. 306, the first reported case, it seems, on the powers of the public corporations entrusted with the operation of the nationalised transport system. Before the coming into force of the Transport Act, 1947, the London Passenger Transport Board (L.P.T.B.) was the only carrier of passengers by road entitled to provide a road passenger service without previously having obtained a road service licence in accordance with the Road Traffic Act, 1930. This privilege was, however, confined to that part of the London Passenger Transport Area which was known as the 'special area', the same 'special area' within which the L.P.T.B. enjoyed and the Transport Commission now enjoys, a statutory passenger transport monopoly. This monopoly was conferred upon the L.P.T.B., and is now conferred upon its successor, the Transport Commission, by the unrepealed section 16 of the London Passenger Transport Act, 1933. The exemption from the need for obtaining road service licences was contained in section 15 of the same Act. Since, by virtue of section 65 of the Transport Act, 1947, the Transport Commission and its agents, the Executives are entirely exempted from the necessity for road service licences, the exemption for the 'special area' in London had become redundant and section 15 of the Act of 1933 was accordingly repealed by the Act of 1947 (section 128 and Schedule XV, Part II). That repealed section, however, contained the definition of the 'special area' which is still a matter of practical importance because of the unrepealed section 16. It is submitted, and the submission derives support from the dictum of Denning J., quoted above, that, for the purpose of interpreting section 16, *i.e.*, the extent of the statutory monopoly, section 15 must be treated as if it was still law. The term 'special area' is meaningless apart from the repealed definition.

This question was not directly before Vaisey J., and the learned judge's attention was not drawn to the fact that section 15 of the Act of 1933 is no longer law. The case of *Smith* v. *London Transport Executive* arose in connection with the present situation in the outer suburban fringe of the Metropolis which, while being part of the London Passenger Transport Area, lies outside the 'special area'. In these peripheral parts of the Metropolitan transport system the L.P.T.B. had the power to run buses and coaches, but it had no monopoly, and, like any other carrier, it required road service licences. Under the Transport Act, 1947, the powers of the Board passed to the Transport Commission, but the powers of the Commission are, of course, very much wider than those of the defunct L.P.T.B. The Commission is quite generally enabled to 'carry . . . passengers by . . . road . . . within Great Britain' (section 2 (1) (*a*)

of the 1947 Act), and, as mentioned above, neither the Commission nor the Executives require road service licences anywhere (section 65), although they must obtain the approval of the Licensing Authority for any route they intend to provide. Hence the London Transport Executive which acts as agent for the Commission with regard to the activities of the late L.P.T.B. may now run bus and coach services in the whole of the London Passenger Transport Area, inside as well as outside the 'special area', without having obtained a road service licence.

In drawing this inevitable conclusion from the provisions of the Act of 1947, Vaisey J. pointed to an apparent anomaly which it involves. The general nationalisation scheme is based upon the idea that private interests affected by the transfer of undertakings to public enterprise should be compensated in a variety of ways. One of the privileges of existing entrepreneurs in the field of road passenger transport is the right to oppose the granting of road service licences to newcomers. Of this privilege the operator of a road service in the outlying parts of the London Passenger Transport Area has been deprived by the 1947 Act without compensation, deprived, that is, in those cases in which the 'newcomer' is the Commission or the London Transport Executive. It is, however, only fair to add that what has been taken away from an operator of this kind (such as the plaintiff in the instant case) is not his undertaking itself or his right to compete, but a quasi-monopolistic privilege which was itself entirely the creation of a statute, *viz.*, the Road Traffic Act, 1930. In relation to the public corporations the Act of 1947 reduced his position to that of an ordinary competitor without statutory protection. Parliament has, as it were, taken away without compensation a privilege which, seventeen years before, it had conferred without exacting a consideration in return. Even the most ardent defender of private enterprise would perhaps find some difficulty in arguing that compensation should be paid for the restoration of conditions of competition.

A further point of general interest in connection with statutory interpretation was the use made by Vaisey J. of section 3 of the 1947 Act which defines the duties of the Commission in very general terms. It is interesting to note that the general programme of economic policy enunciated there has been used as an aid towards defining the legal powers of the public corporation. Is this a step forward in the direction of interpreting statutes in the light of their economic and political objectives?

The learned judge had little difficulty in interpreting the provisions of the 1947 Act itself, but the Scheme of Delegation by which, in virtue of section 5, the Commission had delegated powers to the London Transport Executive, was in the judge's opinion 'obscure and confusing'. It required a certain effort on the part of the court to arrive at the conclusion that the Scheme had achieved what it was intended to achieve, *viz.*, a delegation to the

Executive not only of the activities formerly carried on by the L.P.T.B., but also of connected activities within the powers of the Commission by virtue of the general provisions of the Act. It is submitted that the strictures levelled by the learned judge against the draftsmanship of the Scheme were amply justified.

O. Kahn-Freund.

AN INSURANCE POLICY AS A ' SETTLEMENT '

The words ' settlement ' and ' settled ' are used in three different statutes with three distinct meanings. The first meaning, the ' chancery ' meaning, is found in the Settled Land Act, 1925; the second, the ' bankruptcy ' meaning, appears in section 42 (4) of the Bankruptcy Act, 1914, while the third, the ' divorce ' meaning, appears in section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. Unlike the other two, this divorce meaning, which concerns us here, has never been adequately defined in the score or so of cases where opportunity to do so has arisen. First let us outline the problem : a husband, having divorced his wife (or vice versa), desires to get back property which he has given her or settled on her or in some way made available for her. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, enacts : ' The court may, after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this subsection notwithstanding that there are no children of the marriage '.

Clearly this section gives no power to revoke out-and-out gifts made by the husband to the wife; on the other hand, if there is a settlement in the chancery meaning of that word, the section clearly applies. But a line of cases, while following no one consistent principle, have held that almost any provision made by a husband for his wife, which falls short of an absolute gift, is a ' settlement ' and may therefore be varied by the court in the event of divorce. Two recent additions to this line, *Gunner* v. *Gunner* [1948] 2 All E.R. 771, and *Bown* v. *Bown* [1948] 2 All E.R. 778, have provoked the present note.

Before dealing with those two cases, it is interesting to see what sort of provision for the wife has in the past been considered a ' settlement '. In *Melvill* v. *Melvill* [1930] P. 159, Lord Hanworth M.R. said in the Court of Appeal that the word ' settlement ' was to receive the widest possible interpretation; but his words were too wide for the circumstances before him, since in that case

a wife did in fact settle property for persons in succession. His Lordship made similar remarks four years earlier in *Bosworthick* v. *Bosworthick* [1927] P. 64, 71, in which case a wife had by a bond agreed to pay her husband £300 p.a. for his life. This was held to be a settlement and the court followed their own decision in *Dormer* v. *Ward* [1901] P. 20, Scrutton L.J. saying that a covenant to pay a yearly sum constituted settled property, and rejecting the argument that the covenant merely created a debt. Those two decisions are authoritative, but were distinguished by Langton J. in *Brown* v. *Brown* [1936] 2 All E.R. 1616, when he held that a life annuity bought from an insurance company by a wife for her husband was a gift containing no characteristic whereby it could be described as a settlement. Those three cases illustrate how far the courts will go in cases of annuities for life. Numerous dicta elsewhere assert the wide meaning attached to the section, but no decisions of this type go further than *Bosworthick*. In a rather different type of case a house bought by the husband but conveyed to him and his wife jointly was held to be 'settled'. That was *Smith* v. *Smith* [1945] 1 All E.R. 584, in which Denning J. held that such joint ownership constituted a settlement, partly, it seems, because the land was held on trust for sale, partly by deduction from the following principle: 'Where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a settlement'. The learned judge distinguished *Brown* v. *Brown*, *supra*, and also *Hubbard* v. *Hubbard* [1901] P. 157, in which the Court of Appeal decided that an assignment by a husband of leaseholds to trustees on trust to assign at once to his wife was not a settlement, but a gift. Presumably the distinction between assignment of a leasehold house and conveyance of a joint share in a freehold is that in the latter the tenants incur lasting obligations to each other as trustees for sale. A third type of 'settlement', involving an insurance policy, is illustrated by *Gulbenkian* v. *Gulbenkian* [1927] P. 237, in which a policy payable on a fixed date to the husband if living, otherwise to his wife, was held to be a settlement, since the wife was only contingently entitled.

Such being the state of the authorities, we can consider the present cases. These were the facts in the first case: *Gunner* v. *Gunner*: the husband took out an insurance policy whereby the sum of £5,000 was payable on his death. The policy was expressed to be effected 'under the provisions of the Married Women's Property Act, 1882, for the benefit and separate use' of the wife absolutely. Now by section 11 of that Act such an expression serves to create a trust in favour of the object named, the trustee being either the husband or a person appointed by him. The question arising in this case, which is of enormous importance for insurance companies, is whether such a policy, common as it is, is

'property settled for the benefit of the parties to the marriage'. If it is, the court has jurisdiction to vary it; if it is not, the guilty wife remains entitled after divorce to the money payable on the husband's death. Wallington J. held that this policy was a settlement, and therefore variable. First, had the wife's interest been contingent only, it would not have strained the word 'settlement' to apply it to the policy, but, as the learned judge pointed out, he was bound by *Cousins* v. *Sun Life Assurance Soc.* [1933] Ch. 126 (C.A.), to hold that her interest was vested. Next, although the wife had a vested interest, the learned judge nevertheless held it to be a settlement, preferring, however, to rest his decision on the facts of the case and not venturing to state a general principle. With great respect we submit that the present decision is a justifiable extension of authority. The correct principle would seem to be that a settlement exists where a husband is obligated towards the wife to continue to benefit her financially, for in the policy in this case the husband is created a trustee not merely of the insurance money when it falls due, but of the policy from the moment it is effected (see Married Women's Property Act, 1882, s. 11). If he fails to pay a premium, he commits a breach of the trust. We can distinguish *Hubbard* and *Brown*, since in both cases the settlor never incurred enduring obligations, but in one transaction passed the obligation to a third party and cleared himself. In both cases there was an out-and-out gift. But where, as in *Smith* v. *Smith*, spouses hold a house as trustees for themselves, there is a lasting obligation binding the husband as trustee, just as in *Dormer* v. *Ward* a covenant to pay an annuity created a lasting obligation to pay it.

Bown v. *Bown* [1948] 2 All E.R. 778, the second of the two decisions, arose from an insurance policy bought with a single lump sum. The case seems to confirm the implication in *Gunner*, that a settlement exists wherever money is payable to the wife on a contingency. Indeed, the point was already decided in *Gulbenkian* v. *Gulbenkian* [1927] P. 237, and in *Stedall* v. *Stedall* (1902) 18 T.L.R. 254, neither of which were mentioned by the learned judge in the present case.

To sum up, we suggest that a settlement in the divorce meaning exists—

1. Where property is settled in the strict chancery meaning, and
2. Where property is made payable to the spouse subject to some contingency, and
3. Where the donor obligates himself, as trustee, covenantor or otherwise, to provide for the spouse over a lasting period.

Most insurance policies will be covered by the last head, but no general statement can be made as each policy must be construed when it comes.

D. C. Potter.

RESTITUTION IN EQUITY

IN *Re Diplock* [1948] 1 Ch. 465, executors paid over £200,000 to charitable institutions of their choice in accordance with a residuary bequest which was held void for uncertainty. The next-of-kin brought the present actions against a number of these institutions, some of which had paid the money into general accounts (either in credit, overdrawn and unsecured, or overdrawn and secured partly or wholly) while others had paid it into special accounts, in a few cases earmarking it for particular purposes; in some instances the money had been expended in altering or enlarging existing buildings. The claims of the plaintiffs fell into two main categories: (1) claims 'in personam', based on the alleged right of an unpaid or underpaid beneficiary to recover money overpaid to another beneficiary or (as here) to a stranger to the estate; (2) claims 'in rem', based on the right of tracing assets, where they or their proceeds could be identified in the hands of those who had wrongly received them. Wynn-Parry J. rejected all the claims 'in personam' and most of the claims 'in rem'. The Court of Appeal allowed the claims 'in personam' acknowledging the existence of an equity available to an unpaid or underpaid creditor, legatee or next-of-kin against a recipient who was entitled to nothing or who had been overpaid. The Court of Appeal also allowed the claims 'in rem', with some reservations.

1. *The claims 'in personam'.*

Wynn-Parry J. held that an unpaid beneficiary could only sue a wrongly paid recipient in equity in the same circumstances as those which would enable him in the name of the personal representative to sue at law, *viz.*, when the wrong payment had been made under a mistake of fact. The Court of Appeal agreed that the mistake here was one of law, and that the common law claim for money had and received would have failed. In the words of the judgment: 'It may, we think, be taken as clearly established that the common law claim is founded upon an implied promise to pay and that . . . no such promise will be implied where the payment was made under a mistake of the general law'. But, according to the Court of Appeal, the present claim was different, and rested on an equity traceable from 1669 (Wynn-Parry J. had not, as the court observed, had the advantage of an examination of cases prior to 1800). This equity is available equally to an unpaid or underpaid creditor, legatee or next-of-kin and is not defeated merely by absence of administration by the court or because the original mistake was one of law, not fact, or because the recipient had no title at all and was a stranger to the estate. Nevertheless, the right of the unpaid beneficiary is in the first case against the executor or administrator and, against the recipient, is limited to what cannot be obtained from that source. The Court of Appeal

added : ' As regards the conscience of the defendant upon which in this or in other jurisdictions equity is said to act, it is prima facie at least a sufficient circumstance that the defendant, as events have proved, has received some share of the estate to which he was not entitled. " A party ", said Sir John Leach in *David* v. *Frowd* (1833), " claiming under such circumstances has no great reason to complain that he is called upon to replace what he has received against his right " '.

Two additional points may be noted on this part of the case. First, the Court of Appeal agreed with Wynn-Parry J. that the mistaken interpretation of the will was a mistake of general law; this is contrary to *Earl Beauchamp* v. *Winn* (1873 L.R. 6 H.L. 223, 234, *Allcard* v. *Walker* [1896] 2 Ch. 369, *Daniell* v. *Sinclair* (1881) 6 App.Cas. 181, and *Hickman* v. *Berens* [1895] 2 Ch. 638 (see Professor Winfield's article in 64 L.Q.R. p. 50). Secondly, the Court of Appeal delivered another blow for the ' implied term ' school in the controversy concerning the basis of quasi-contract.

2. *The claims ' in rem '.*

Wynn-Parry J. decided that the equitable right to trace disappeared when the money was paid into the recipient's banking account, because he held that *Re Hallett's Estate* (1880) 13 Ch.D. 696 and *Sinclair* v. *Brougham* [1914] A.C. 398 were limited to cases where the mixing took place in breach of trust actual or constructive, or of some fiduciary relationship. This view, according to the Court of Appeal, was contrary to Lord Parker's judgment in the latter case for he had asserted that, where a volunteer mixes, the person entitled in equity to part of the fund may charge it pari passu with the volunteer. Wynn-Parry J.'s error was in thinking that ' what, in *Hallett's Case* was only the method (there appropriate) of bringing a much wider-based principle of equity into operation—*viz.*, the method by which a fiduciary agent, who has himself wrongfully mixed the funds, is prohibited from asserting a breach of his duty—is an element which must necessarily be present before equity can afford protection to the equitable rights which it has brought into existence '. In *Sinclair* v. *Brougham*, said the court, there was no fiduciary relationship between the society and the depositors, since the only parties to that relationship were the directors and the depositors. Therefore, the principle behind the depositors' claim must be wider and must affect the conscience of volunteers provided that, as a result of what has gone before, some equitable proprietary interest has been created and attaches to the property. The volunteer who mixes or receives a mixed fund may claim in respect of his own money and shares pari passu with the true owner. This is one application of an equitable principle common to all cases of mixed funds, operating in different ways according to the circumstances.

The above notes on this 'remarkable' case, as the Court of Appeal calls it, are not intended to add up to a summary. *Re Diplock* will, we think, defeat case-book editors. The great length of the judgment, its historical span and its importance to so many aspects of equity and common law render anything in the nature of general comment in a few words valueless.

J. A. G. GRIFFITH.

FRAUD IN FOREIGN JUDGMENTS

WHETHER the nature of fraud for the purpose of setting aside a foreign judgment registered under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, is the same as that which a defendant had to show for similar purposes before the Act was passed, has long presented one of the minor problems of the Conflict of Laws. The decision of the Court of Appeal in *Syal* v. *Heyward and Another* [1948] 2 All E.R. 576 is the first to make any serious contribution to the solution of this problem; but it is a decision which leaves certain doubts for future resolution.

The original foreign judgment in this action was obtained in India in respect of a sum of Rs.20,000, which the plaintiff claimed he had lent to the defendants, two army officers. The judgment was registered in England under the Act of 1933, whereupon the defendants applied for an order setting aside the registration under section 4 (1) (*a*) (iv) of the Act, which runs as follows:—

> '4—(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—
>
> (*a*) shall be set aside if the registering court is satisfied—
>
> (iv) that the judgment was obtained by fraud.'

The ground of fraud alleged was the defendants' contention that the loan was for Rs.10,800 only, an amount for which they freely admitted liability, the balance consisting of commission and interest payable in advance: and that the plaintiff's allegation before the Indian Court that the defendants had borrowed the full amount concealed from the court the possibility of their having a defence under the Indian Usurious Loans Act. The application on this evidence having been rejected by the master on the ground that the facts were known to and could have been raised by the defendants in the Indian proceedings, the defendants appealed to the judge (Jones J.) who directed an issue to be tried on condition of the defendants paying into court the full amount of the judgment debt, and security for costs. The defendants appealed from this order on the ground that the court had no jurisdiction to impose conditions of this kind if it decided to direct an issue.

Two questions were raised for the Court of Appeal; the first point dealing with payment into court of the debt and the sum for security for costs, was decided in favour of the defendants on the

ground that ' in proceedings under the Act of 1933, the court is not bound to direct an issue. It should not do so in the case of an application based on an allegation of fraud, unless it is satisfied that a prima facie case of fraud on the court is established; but if it is so satisfied, one can see no justification for such an order as Jones J. has made in this case ' (*per* Cohen L.J. delivering judgment of the court, at page 580).

The second point, whether a prima facie case existed on which an issue could be directed, turned upon the question whether ' where a judgment is sought to be set aside on the ground of fraud, the fraud must have been discovered by the applicants since the date of the judgment ' (at page 579). In deciding this question, the court was faced with two conflicting principles :—

1. The Court of Appeal in *Birch* v. *Birch* [1902] P. 130, following dicta of the House of Lords in *Coaks* v. *Boswell* (1886) 11 App.Cas. 232, had accepted the view that in proceedings to set aside an English judgment, the defendants cannot ask for a re-trial of the issue of fraud on facts known to them at the date of the earlier judgment. The point does not appear to have been taken, however, that the fraud alleged in *Birch* v. *Birch* was fraud on the court itself, and took the form of obtaining probate of a will later alleged to have been forged. The court, referring to the two cases, remarked (at page 579) : ' These cases, no doubt, establish that in proceedings to set aside an English judgment the defendants cannot ask for a re-trial of the issue of fraud as between them and the plaintiff on facts known to them at the date of the earlier judgment, but in cases under section 4, the question is not one of fraud on the plaintiff, but of fraud on the court, and it seems to us to be clearly established by authority binding on us that, if the defendant shows a prima facie case that the court was deceived, he is entitled to have that issue tried, even though, in trying it, the court may have to go into defences which could have been raised at the first trial '.

   Furthermore, the Court of Appeal and defendants' counsel in the present case accepted the proposition of plaintiff's counsel that precisely the same tests applied whether the judgment sought to be set aside was a foreign judgment or an English judgment; a proposition for which authority was found in a dictum of Lindley L.J. in *Vadala* v. *Lawes* (1890) 25 Q.B.D. 310, at p. 316. From these decisions it would appear that the defendants were not entitled to a new trial.
2. The court accepted the plaintiff's contentions that the fraud contemplated by section 4 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, was fraud on the court and that an application under that section should be treated

> in the same way as an action to set aside a judgment would have been treated before the Act of 1933 came into force. On the authority of *Abouloff* v. *Oppenheimer* (1882) 10 Q.B.D. 295, as explained in *Vadala* v. *Lawes* (*supra*), the English court on an allegation of fraud on the foreign court, sufficiently substantiated by facts, may clearly re-open the whole case, and re-try the issue on its merits, whether or not the facts constituting the alleged fraud were known to the defendant at the time of the original hearing.

The court considered that the second principle prevailed; 'In the present case', said Cohen L.J., 'it is plain that the defendants are alleging a fraud on the court, and it is, therefore, immaterial that to establish their allegation they will have to adduce evidence which was available to them before the date of the Indian judgment' (at p. 580).

The court thus appeared to distinguish between fraud on the party and fraud on the court,[1] on the principle that in the former case only new facts coming to light after the judgment would justify ordering a new trial : while in the latter it was immaterial whether or not the grounds of the alleged fraud were known at the earlier date. In so far as *Birch* v. *Birch* was used to support this distinction, it does not seem to be relevant. In so far as a distinction can be drawn between *Birch* v. *Birch* on the one hand, and on the other *Abouloff* v. *Oppenheimer* (1882) 10 Q.B.D. 295, and *Vadala* v. *Lawes* (1890) 25 Q.B.D. 310, it would seem rather to lie in the irrational principle that to disturb an *English* judgment allegations of fraud must be based on facts subsequently discovered; whereas to re-open a *foreign* judgment on this ground no such limitation of time is imposed. Such a distinction suffers from the defects both of its inherent absurdity and of being completely inconsistent with the proposition which the court accepted, that the same principles apply in respect of both English and foreign judgments. It is, moreover, somewhat uncertain whether English courts have made a clear legal distinction between fraud on a party and fraud on a court. Dicey's different basis of distinction has already been noted. In any case, from the point of view of the vulnerability of a judgment, the distinction between fraud on the party and fraud on the court must be one of degree rather than of kind, in the sense that while fraud of the parties jointly, *e.g.*, collusive divorce proceedings, is directly fraud on the court and not fraud on either party, the fraud of one party on the other is indirectly a fraud on the court itself in leading the court to a wrong decision. But the case of *Ochsenbein* v. *Papelier* (1873) L.R. 8 Ch. 695 gives some support to the distinction made in *Syal* v.

[1] Cf. Dicey's distinction (Rule 105) between fraud on the part of the successful party and fraud on the part of the court giving judgment: *Conflict of Laws*, 5th ed., p. 448.

Heyward, and would seem to provide some justification for comment on the latter decision.

It may be doubted whether the restrictive interpretation of 'fraud' in section 4 (1) (*a*) (iv) of the Act to 'fraud on the foreign court' is really justifiable. Nothing in the Act itself limits the generality of the term in this way. The fact that the Act is dealing only with foreign judgments is irrelevant to the point of whether fraud is on the foreign court or on either that court or a party subject to its judgment. In the interpretation section (s. 11) of the Act, Parliament has defined almost every important expression employed except 'fraud'; and this omission, leaving unrestricted the meaning of fraud in general law, can hardly be considered accidental. Section 4 of the Act, moreover, does not necessarily involve a re-trial on the merits, nor the relevance of the time at which evidence of the fraud is first discovered; but merely provides for the setting aside of the registered judgment. Finally, the acceptance by the court of the proposition that the pre-1933 law applies equally to setting aside a judgment under the Act, implies that the restriction of fraud on the foreign court (or on an English court, since it was accepted that the same principles applied in both cases), was the only type which would justify the setting aside of a judgment before 1933. Yet the court had apparently understood *Coaks* v. *Boswell* and *Birch* v. *Birch* as deciding that fraud purely inter partes might suffice to set aside a judgment, provided that the facts constituting the fraud only became known to the party aggrieved after the date of the judgment.

In short, the first two submissions of counsel for the plaintiff that :—

(1) The fraud contemplated by section 4 of the Act is fraud on the court, and

(2) An application under section 4 of the Act should be treated in the same way as an action to set aside a judgment before the Act came into force;

submissions uncontested by the defendants and apparently accepted without argument by the court, appear for reasons stated above to be mutually inconsistent. But whatever the reasoning, the result of this decision is that 'fraud' for the purposes of section 4 of the Act of 1933, means always and only fraud on the court; and that in proving such fraud defences may be raised which were available to the defendants at the date of the original trial.

R. H. Graveson.

'PURPORTED EXERCISE OF BELLIGERENT RIGHTS'

The decision of the President in *The Bellaman* and *The Agostino Bertani* ([1948] 2 All E.R. 679), effects no development in the law of prize. It merits attention, however, as the first case to come

before the English Prize Court requiring the interpretation of the Treaty of Peace with Italy, 1947, which, by virtue of the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947, and the Treaty of Peace (Italy) Order, 1948, has the force of law, and is binding upon the Prize Court (*The Bathori* [1934] A.C. 91, 97).

The Bellaman and *The Agostino Bertani* were Italian vessels sunk in Tripoli harbour by Allied action before that port fell into Allied hands. By the Armistice with Italy, 1943, the right to capture Italian merchant vessels was precluded, but this was not to interfere with the right to take the incidental steps necessary to give effect in the Prize Court to captures made before that date. In 1944 a Standing Order was issued by the Admiralty concerning the salvage of ex-Italian vessels. Nothing was done about either of these vessels until February, 1947, one week before the signature of the Italian Peace Treaty, when the White Ensign was hoisted on each of them. By Article 76 of the Peace Treaty, all ' claims arising out of the exercise or purported exercise of belligerent rights ' are barred. The Prize Court had to determine whether this Article applied in the present case.

After signature, but before ratification, of the Treaty writs in prize were issued, so that when Article 76 became law both vessels had been placed under the jurisdiction of the Prize Court. Merriman P. held, in the light of precedents from 1801 to 1934, and particularly *The Bathori*, that the Standing Order of 1944 showed that the salvage of vessels in the position of *The Bellaman* and *The Agostino Bertani* was contemplated, and that as the White Ensign was hoisted and the prize writs issued before the Treaty came into force, it was ' impossible, whether the vessels were actually condemnable in prize or not, to hold otherwise than that these are claims arising, at the least, out of the " purported exercise of belligerent rights " ' (p. 683). For this reason he considered the claimants' right to sue as barred.

To hold thus did not mean that the vessels were liable to condemnation as prize, for this depended on seizure before the date of the Armistice. There was a prima facie presumption that the capture of the port involved the seizure of the vessels. However, by the Naval Prize Act, 1864, s. 16, it is provided that every vessel taken in prize shall ' forthwith ' be delivered to a marshal of the Prize Court, or, failing him, to the principal officer of customs at the port to which the vessel is brought. Although it was perfectly easy for this to have been done with these ships, no such steps were taken. In fact nothing was done for four years, which might suggest that seizure was not effected until 1947.

The President was of opinion that those on the spot might have considered, in the light of the 1944 Order, that no steps were necessary until salvage operations were about to begin. Further, the ships were aground and could not escape, save by the recapture

of the port by the Germans. He decided, therefore, that despite the failure to carry out the strict letter of the 1864 Act, there had been a lawful seizure and the ships were ' condemnable as good and lawful prize ' (p. 684).

This case makes it quite clear that the President, in interpreting the Peace Treaty and other documents in the case, was primarily concerned with giving effect to their intention, and in order to do so was quite prepared to ignore minor failings of a formal character.

L. C. Green.

INCOME TAX LIABILITY OF MARRIED WOMEN

Although in *Nugent-Head* v. *Jacob*, the courts were concerned with the interpretation of the words ' a married woman living . . . *separate* from her husband ', in Proviso (2) to Rule 16 of the General Rules applicable to all Schedules to the Income Tax Act, 1918, yet Macnaghten J. (62 T.L.R. 66) and the Court of Appeal (62 T.L.R. 620) and the House of Lords ([1948] A.C. 321) were all concerned to comment also upon the meaning of the words ' a married woman *living with* her husband ', in Proviso (1). In that case, both the Revenue authority and the taxpayer found it to their advantage to contend that the wife was ' living with ' her husband, but, in his note in the *Modern Law Review*, Vol. 10, p. 198, Mr. Colinvaux concludes that this was a ' false hypothesis ', because ' Proviso (1) is limited to mere physical living together, and does not apply, for instance, to the situation where a husband is away from his wife for some years on active service ' (or, as would be the typical example when the Rule was first drafted, where a husband left home for the plantations). It was the opinion of Macnaghten J., too, that ' if the second proviso only refers to cases where the spouses happen for the time being to be living in different places, it seems to follow that the words " living with her husband " in the first proviso must mean living together at the same place '. In his further note (*Ib.*, Vol. 11, p. 346), Mr. Colinvaux, after citing Lord du Parcq's opinion that, had it been argued that the parties were not living together, the result would no doubt have been the same, submits that the decision of the House of Lords ' is consistent with and would have been assisted by, a factual definition of " living with " '. Since the House was concerned with the construction of Proviso (2), it is still true to say (as Mr. Colinvaux said before their decision) that the words ' living with ' in Proviso (1) ' have not yet had a full and satisfactory judicial construction given to them '. In the absence of such a construction, a decision of the High Court in Eire, to the effect that the words ' living with ' are not to be taken as describing a merely factual and local physical cohabitation, may be of interest, even

though it has been suggested (by Lord Blackburn in *Derry* v. *I. R. C.* [1927] S.C. 714, 721) that it is no more than a question of fact for the Commissioners.

By reason of an official regulation which forbids a policeman from residing within thirty miles of his wife's place of business, the respondent in *Ua Clothasaigh* v. *McCarten* [1948] Ir.R. 219, who was a member of the Civic Guard and whose wife carried on the business of a publican, resided in lodgings some seventy-five miles away from the public-house in which his wife and family lived. He spent his leave (about twenty-eight days each year) in the family home and intended to settle down there on retirement or on the relaxation of the regulation. Upon these facts, Maguire J. had no difficulty in holding that they were living together, as they fell within the category of 'husbands and wives who are for the time being living apart, not because they wish to do so, but by reason of the force of circumstances' (*per* Bucknill L.J. [1944] K.B., at p. 22). This decision is in keeping with that of the House of Lords in *Nugent-Head* v. *Jacob*, where two factors were considered to be relevant in deciding whether a married woman is 'living with' her husband. In the first place, there must have been 'no rupture of marital relations' (*per* Viscount Simon L.C. at p. 324, and again at p. 326); cf. Lord Uthwatt's reference (at p. 328) to the parties 'sharing their matrimonial life', and Lord du Parcq's opinion (at p. 331) that 'the phrase . . . is apt to describe a wife living in amity with her husband'. This follows the judgment of the Court of Criminal Appeal in *R.* v. *Creamer* [1919] 1 K.B. 564, 569, that 'in determining whether a husband and wife are living together, the law has regard to what is called the consortium of husband and wife which is a kind of association only possible between husband and wife. A husband and wife are living together . . . even if they are divided by the high seas, provided the consortium has not been determined'. In the Scottish Court of Session, Lord Sands appears to have been of the same opinion in *Derry's Case*, *l.c.*, at p. 719; but in the Irish Divisional Court, Sullivan P. stated in *Donovan* v. *Crofts* [1926] Ir.R. 477, that the legal relationship of husband and wife does not mean that, in the absence of a determination of such relationship by process of law, deed or estrangement, the court must hold that the parties are living together. In the second place, there is the more important test that the parties had 'a common marital home' (*per* Viscount Simon, at p. 324), although it was pointed out by Bucknill L.J. in the Court of Appeal (*l.c.*, at p. 22) that 'the home need not be a house or even a room, and need not be at any fixed geographical point'. This test of the common home is that adopted by Rowlatt J. in *Eadie* v. *I. R. C.* [1924] 2 K.B. 198, 207—that 'they still have their common home, or common homes if they are rich people and have more than one house. They still act from the same base, if I may use that expression'. It follows that a geographical separation

even for a long time cannot in itself prove that the spouses are not living together; and Lord Blackburn's apparent opinion to the contrary in *Derry's Case*, *l.c.*, at p. 721, was expressly disapproved by Viscount Simon L.C. (at p. 326).

If, then, the continued existence of a matrimonial home is the most important feature to be considered in such cases, it is not a little startling to find that in the Court of Appeal in *Fearns* v. *Fearns* [1948] P. 247, when counsel speaks of the wife remaining in the matrimonial home during her husband's absence on military service, he is faced with Cohen L.J.'s question, 'Can it not be said that, owing to the war, there is no matrimonial home here?' It may, perhaps, be that Cohen L.J. had in mind the fact that adultery had been committed, but the question as reported contains the necessary inference that the matrimonial home did not exist '*owing to the war*', *i.e.*, by reason of the husband's absence on active service. But it is submitted with respect that an examination of the reason for the rule in the Income Tax Acts shows that the proper test is that laid down in *Nugent-Head* v. *Jacob* and is unconnected with mere geographical separation. The practice of aggregating the income of husband and wife 'may be justified by the consideration that in the normal case it really is in effect joint income, the spouses being as one person with common interests and responsibilities' (*per* Lord Sands in *Derry's Case*, *l.c.*, at p. 719). If this be so, the rule should apply until the 'break-up' of the home in the colloquial sense.

J. A. COUTTS.

PATENTS AND INVENTIONS—USE BY CROWN

SECTION 29 of the Patents and Designs Act, 1907 to 1946, provides that a patent shall have effect against the Crown, but entitles any Government department by themselves or their agents or contractors authorised in writing to use any invention for the services of the Crown. Such use does not constitute an infringement of the patent but entitles the patentee to receive compensation from the Crown. The terms of any agreement or licence concluded between the patentee and any person other than a Government department are declared inoperative so far as concerns use of the invention for the service of the Crown. Extended powers to use patented inventions for the services of the Crown are given for any war period.

Regulation 3 (5) of the Defence (Patents) Regulations, 1941, provides that the Minister of Supply may authorise the use of any drawing, model, plan or other document or information in the interests of the defence of the realm or the efficient prosecution of the war. Any licence or agreement conferring a right to receive any payment in respect of such use is declared inoperative.

In *American Flange and Manufacturing Co., Inc.* v. *Van Leer*

[1948] 2 All E.R. 698, the plaintiffs by agreements of 1928 and 1932 had granted to the defendant licences to make in Great Britain and elsewhere devices called 'sputs' and 'plugs' forming part of metal containers (drums) for holding liquid. The purpose of the sputs and plugs was to provide liquid-tight closures for the openings of the drums. The agreement covered patented and unpatented sputs and plugs. The royalty was fixed at ½ U.S. cent. for each sput or plug. The agreement provided for the exchange of manufacturing information, blueprints, drawings, etc.

During the war the defendant (or his sub-contractors) made over 34,000,000 sputs or plugs and sold them to the Ministry of Supply under contracts concluded with the Ministry. The contracts included the usual standard conditions authorising the contractor under section 29 of the Patents Act and Regulation 3 (5) of the Defence (Patents) Regulations, 1941, to use for the purpose of performing the contract (but not otherwise) inventions, designs, drawings, other documents or information, etc. The standard conditions precluded any royalty, licence, etc., to be allowed as items of cost incurred by the contractor, but relieved the contractor from any liability to pay royalties, licence fees, etc., and instructed him to refer claims of that nature to the Ministry.

In the action the plaintiffs claimed from the defendant royalties on the sputs and plugs supplied to the Ministry. The claim was dismissed by the court.

It was found by the court that the sputs and plugs supplied to the Ministry were not covered by any subsisting British patents because the patents of the plaintiffs had either expired or covered only a combination comprising the drum, the drum-flanges, the sputs and the plugs, and not the sputs or plugs separately as independent units. On this basis the court held that the authorisation by the Ministry under section 29 of the Patents Act did not absolve the defendant from obligations under the agreement because this section refers only to patented inventions.

On the other hand, the court held that regulation 3 (5) of the Defence (Patents) Regulations, 1941, covers patented as well as unpatented inventions. The supply of the sputs and plugs to the Ministry involved the use of information, etc., received by the defendant from the plaintiffs under the agreements. Consequently, the authorisation by the Ministry under the Defence (Patents) Regulations, 1941, absolved the defendants from the royalty payments stipulated in the agreements.

While the claim brought by the plaintiffs against the defendant before the High Court failed, the plaintiffs can apply to the Royal Commission on Awards to Inventors for remuneration for the use of their unpatented inventions. They have a fair chance of getting an award if they can prove that their information, drawings or processes were used for the manufacture of the sputs and plugs supplied to the Ministry, and that the information, etc., was of

exceptional utility and contributed to the efficient prosecution of the war.

On the other hand, if after the expiration of the patents the agreements constituted nothing but a mere division of exclusive territories and if no valuable information flowed to this country, the plaintiffs will receive nothing.

The law in this case therefore appears to conform to natural justice.

Peter Meinhardt.

REVIEWS

JUSTICE AND ADMINISTRATIVE LAW. By W. A. ROBSON. Second Edition. [London: Stevens & Sons, Ltd. 1947. 554 pp. (index). 25s.]

THE second edition of Dr. Robson's pioneer work on Administrative Justice in England is overdue and very welcome. When first published in 1928, the book presented three revolutionary theses: firstly, that England had a large number of administrative courts; secondly, that these tribunals were developing a body of administrative law; thirdly, that this was a good thing provided that a number of reforms proposed by Dr. Robson were carried into effect. It cannot be said that Dr. Robson's propositions are now accepted without question, but they have ceased to appear revolutionary. In this second edition Dr. Robson has developed in the same luminous and persuasive style the same general arguments, with a great wealth of additional illustrations, and a history of the dispute, on the whole subject, which has continued from the Lord Chancellor's Committee on Ministers' Powers in 1929 until the publication of Dr. Allen's *Law and Orders* in 1945, and is likely to continue until Hayek is proved either right or wrong.

It seems to be the fate of contemporary works on this subject to possess a polemic character and to be deficient in the kind of practical detail which is particularly interesting to lawyers and students. The polemic is less obvious in Dr. Robson's book than it is in the works of Lord Hewart and Dr. Allen, but it is there. Dr. Robson starts, generally speaking, with assumptions opposite from those of Hewart and Allen. His assumptions are that the collectivist state is not only inevitable but desirable, and that systems of administrative justice, improved as suggested by him, are not only inevitable in such a state but are desirable for their own sake. Whether one agrees with these assumptions or not, one cannot deny that by acting on them Dr. Robson has been able to produce a much more careful and scholarly survey of the field than the writers who have started from the opposite assumptions. It is to be regretted that Dr. Robson could not find space for a more detailed investigation of the actual procedure of administrative tribunals and of the rules governing judicial review of their activities; this is a field of law developing so rapidly that we urgently need a book which supplies both a technical analysis of existing law and a more general study of the social process influencing its development. Perhaps a *Manual of Administrative Justice* from the same pen is indicated.

There are many points of detail in this book which one could discuss at length without criticising its main theses. For example, judges can sometimes, like administrators, initiate proceedings (p. 70).[1] Advisory opinion procedure [2] and the Australian extension of the remedy in *Dyson's Case* [3] (both developments to meet the requirements of a Federal Constitutional system) enable courts to determine classes of cases in advance, and furthermore it may be doubted whether administrators can dispose of 'a thousand cases with but a single wave of the pen' unless they are legislating (pp. 78–9). It may be doubted whether Dr. Robson has differentiated with sufficient care (pp. 226–7)

[1] *R.* v. *Fed. Court of Bankruptcy* (1938) 59 C.L.R. 555, noted in Sawer, *Australian Constitutional Cases*, at p. 453.
[2] *Att.-Gen. of Ontario* v. *Att.-Gen. of Canada* [1912] A.C. 571.
[3] *Att.-Gen. of Victoria* v. *Commonwealth* (1946) 71 C.L.R. 237; Sawer, *op. cit.* 399.

between 'domestic' tribunals which have become sufficiently public in character to attract the prerogative writs and those which can be controlled only by injunction. In the latter case it is by no means true that the courts can always interfere where there is denial of 'natural justice', since the only formal ground for interference is failure to observe the rules of the association in question[4]; the rules of natural justice may be embodied in those rules or be introduced into them by fictions of interpretation. It may also be doubted whether judicial review of the substantive merits of the decision of domestic tribunals would be desirable in the case of all such tribunals. Where industrial courts of special experience and outlook exist, as in Australia, there is no difficulty in providing a valuable supervisory jurisdiction over trade union committees, but union members and officers might rightly regard with grave suspicion a proposal that their domestic disputes be subject to the heavy-handed and sometimes unsympathetic interference of the ordinary courts. It has perhaps not occurred to Dr. Robson that the reluctance of administrative tribunals to give reason for their decisions is to some extent the product of the kind of judicial control which at present exists; an administrative tribunal which accepts the pressing invitation of Lord Halsbury to give its reasons may find that the more reasonable those reasons are administratively, the more likely they are to be used as the basis for a quashing order[5] (see pp. 273–8). Dr. Robson might have analysed further (pp. 276–8) the difficult distinction between 'automatic' following of a 'settled rule', prohibited to administrative tribunals, and the 'flexible' application of a 'general policy', which is permitted. The distinction is not nearly so clear as Dr. Robson would suggest, and it is obviously necessary to work out the distinction before his proposal for separate tribunals working subject to a published ministerial declaration of policy could be carried into effect. When does a 'settled policy' become a piece of legislation? Reverting to publication of reasons for administrative decisions (p. 303), it may be doubted whether the Common Law technique of precedent, even on a persuasive basis, is necessarily the best way of developing legal principles and creating predictability of decision.[6] Something like an edict of an administrative praetor might be preferable.

However, one major analytical problem on which it is possible to differ from Dr. Robson is whether 'judicial' and 'executive' justice can be distinguished from each other along the lines indicated by the Committee on Ministers' Powers—that is, by reference to the presence or absence of 'policy' considerations at the stage of decision. Dr. Robson will have none of this kind of distinction between 'judicial' and 'quasi-judicial' function, and in his anxiety to discredit it he even descends (p. 403) to that substitution of incantation for thought of which he elsewhere (p. 488) rightly accuses Dr. C. K. Allen. There is more in the distinction than Dr. Robson concedes. It should be said first that disputes may be classified in different ways for different purposes, and the legal habit of using the word 'judicial' in all such contexts is unfortunate. If Dr. Robson had examined more carefully the context of the decision of the Privy Council in the *Shell Case*[7]—a decision which puzzles him—he would have seen the possible validity of the distinction between 'judicial power' in a narrow sense (as contemplated by Chap. 3 of the Australian Federal Constitution) and 'judicial power' in a wider sense (*e.g.*, as contemplated by the rules

[4] *Maclean* v. *Workers' Union* [1929] 1 Ch. 602.

[5] *Estate & Trusts Agency* v. *Singapore Improvement Trust* [1937] 1 A.C. 898; *R.* v. *Milk Board* [1944] V.L.R. 187. This consideration, of course, supports Dr. Robson's case for a special system of administrative courts.

[6] See a discussion by Paton and Sawer in 63 L.Q.R. 461.

[7] [1931] A.C. 275. If this decision was unsatisfactory, it was only because the Board repeated the very ambiguous definition of judicial power given by Griffith C.J., which Dr. Robson quotes with apparent approval (pp. 7–8), and because the Board did not have the courage to overrule the unsatisfactory decision of the High Court in the *B.I.O. Case* (1925) 35 C.L.R. 422.

governing certiorari). In interpreting Chap. 3 of the Constitution, the High Court of Australia has drawn a distinction between decisions which in substance create rights (such as awards of the Court of Industrial Conciliation and Arbitration settling industrial disputes) and decisions which declare the existence of rights arising from pre-existing law (such as a decision of the same court on a prosecution for breach of an award). For this particular purpose, creative or 'constitutive' decisions are not judicial; only interpretative decisions can be judicial.[8] That this kind of analysis has some general validity is suggested by the innocent observation of Lord Thankerton in *Yaffe's Case*[9] that the function there being considered was 'legislative'—a piece of Scotch logic which if 'legally' true must have defeated the plaintiff *in limine,* since he was suing in prohibition and certiorari! Indeed, it seemed at one time not impossible that this kind of distinction might be applied to limit the scope of the prerogative writs: see the judgment of Palles C.B. in *Re Local Government Board.*[10] A tribunal formally engaged in creating a right pays more conscious attention to policy, and has a wider discretion, than a tribunal formally engaged in applying by strict deduction the terms of an established law to the facts of a particular case. It is easy to show that the decisions of ordinary courts are not always exercises in deduction, either because a supposed law is actually an instruction to exercise a discretion, or because categories of circuitous, indeterminate, multiple or competing reference give a choice of rules.[11] But in the vast majority of cases that come before courts the only dispute concerns the existential premise—the facts—and once that is determined the process becomes strictly deductive, while even in the small number of appellate cases requiring the courts to legislate, the choice of rules and the technique of choosing them differ in degree from the choice and the technique of more frankly 'constitutive' tribunals. So perhaps the true criticism of the distinction between judicial and quasi-judicial function drawn by the Committee on Ministers' Powers is that the Committee should have explained *why* policy is a more important constituent of quasi-judicial than of judicial decisions; it is because in this context judicial decision is *formally* interpretation, quasi-judicial decision is *formally* creation or destruction of rights by procedures analogous with those of ordinary courts. As usual, the clear formal distinction corresponds to an actual situation in which no clear boundaries are found, but whose cases form cluster-patterns that can be fitted to a continuous curve. But these analytical considerations make no difference to the validity of Dr. Robson's major recommendations for the reform of administrative justice, recommendations which are as valuable for the Dominions as for Britain itself; and there is every justification for the gusto with which he demonstrates the timidity, stupidity and professional vested interests which alone prevented the 1929 Committee and subsequent investigators from cleaning up this particular stable.

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A FRAGMENT ON GOVERNMENT and AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION. By JEREMY BENTHAM. Edited with an Introduction by WILFRED HARRISON, Fellow of Queen's College, Oxford. [Oxford: Basil Blackwell. 1948. lxviii and 435 pp. 9s. 6d. net.]

WHEN we review from a century of distance the results of Bentham's work he appears as a many-sided reformer of genius, some of whose more grandiose

[8] *Alexander's Case* (1918) 25 C.L.R. 434, and see the notes to the *Shell Case* and *Rola Case* in Sawer, *op. cit.*, pp. 432, 447.
[9] [1931] A.C. at 532.
[10] 16 L.R. (Ir.) 150.
[11] See Stone, *Province and Function of Law*, Chap. VII.

schemes may have been misconceived but whose solvent criticism and fecund suggestion were applied with effect at a hundred widely different points in the fabric of English law and administration. To himself and his followers, however, Bentham was essentially a systematic philosopher, whose practical proposals were reached by strict logical analysis of his subject-matter and the application to the matter so analysed of the single infallible criterion of Utility. The *Principles of Morals and Legislation* is, in a sense, his most important book, because in it he attempts to formulate his fundamental guiding principles, to do for his other works 'the office which is done by books of pure mathematics to books of mixed mathematics and natural philosophy'. First, he expounds the Principle of Utility and the calculus of pleasure and pain, then he treats of 'human actions in general', of motives, of 'human dispositions in general', and so proceeds to the topics of punishment, the division of offences and the limits of penal jurisprudence. So much was written and printed in 1780 with the limited design of serving as an introduction to a plan of a penal code. Then Bentham 'found himself unexpectedly entangled in an unsuspected corner of the metaphysical maze', to wit, the distinction between the civil branch of jurisprudence and the penal, resolution of which would require a profound investigation into the whole question: What is a law ? and he suspended publication; in 1789 he published the work, still incomplete, with a concluding note indicating that its completion 'might require a considerable volume'; it was only in 1945 that the material of this further work was disinterred from the unpublished Bentham MSS. by Professor Everett and published under the title of *The Limits of Jurisprudence Defined.*

Some day the two parts, the *Principles* and the *Limits*, may be united, as they should be, in a single volume. In the meantime students will be glad of this reprint of the *Principles* in Messrs. Blackwell's handy series. Its discussions may be 'arid' and 'dry and tedious'—Bentham's own words; Bentham's psychological analysis may be out of date for modern psychologists, though perhaps still ahead of some of the lawyers; the Principle of Utility itself is by now discredited as an infallible criterion of universal application; yet the book is important as containing the key to all Bentham's works, as the starting point of much of our typically English jurisprudential thought, as in itself a tremendous effort of sustained thinking, and as containing many passing remarks memorable for their epigrammatic vigour and their plain good sense.

Bentham might not altogether have welcomed praise on this last account. The principal merit which he claimed for himself was of laborious and thorough investigation; in so important and difficult a field the graces of style were suspect. The truths in which he dealt 'are not to be forced into detached and general propositions, unincumbered with explanations and exceptions. They will not compress themselves into epigrams. They recoil from the tongue and the pen of the declaimer. They flourish not in the same soil with sentiment. They grow among thorns and are not to be plucked like daisies, by infants as they run'. But his modern readers may regret that in his maturer work he thus attempted to check his own great gifts for terse and epigrammatic statement, for declamation and denunciation. He gave them freer rein in his early *Fragment on Government,* also reprinted in this volume. To the amateur of invective it is always pleasant to have an excuse for renewing his admiration of some of Bentham's thrusts. But really most of it is thin, poor stuff—silly, petulant, iterative, juvenile. Many of his apparent scores are made only by reading into Blackstone what Blackstone had not said, and on at least one point, the balance of the constitution and the danger of legislative despotism, Blackstone has proved wiser than Bentham.

As in other volumes in this series the reprinted texts are accompanied by an editorial introduction. Mr. Harrison is patient, careful and lucid, neither so pedantic as Bentham at his worst nor so pungent as Bentham at his best. The legal reader must bear in mind that this series is offered as a series of *political* texts and Mr. Harrison is writing for the student of political theory,

not for the historian of legal reform or even for the general moral philosopher. His main concern is to place Bentham as a political thinker in his 'setting', to relate Bentham's political ideas to those of Locke, Hume and Voltaire as well as to the writers like Helvetius and Beccaria who more directly influenced his thought. Accordingly he devotes eight pages to an exposition of the argument of the *Fragment* and only three to the much longer and more important *Principles,* because the latter work is 'even less concerned' with political theory. This volume, then, is designed for only one class of Bentham's readers, but within its limits and for its own expressed purposes it should be acceptable and useful.

A. H. CAMPBELL.

OUTLINES OF JURISPRUDENCE. By B. R. WISE, M.A. Sixth Edition by R. W. M. DIAS, M.A., LL.B. [Oxford : J. Thornton & Son. 144 pp. 6s.]

THE purpose of this book is 'to introduce students to the many-sided problems of jurisprudence'. To achieve this it is divided into an analytical and an historical part. The province of jurisprudence is confined in the analytical part to a discussion of fundamental notions and principles of State, and particularly English, law. It is perhaps the emphasis on English law which accounts for the single perfunctory reference to Professor Kelsen (p. 20), whose views on rights, duties and the relation of public to private law have some claim to inclusion in an analytical discussion.

The conclusion reached on law is that 'it is more accurate to regard law as a mode of behaviour that is compulsorily observed, rather than as something that is commanded'. This definition need occasion no surprise to the student who is familiar with the late Professor Buckland's lament that Austin is now regarded as a disease—but brevity is purchased at the price of obscurity. 'A rule of human conduct which is recognised as being obligatory' (Professor Goodhart) is as simple, and places less emphasis on efficacy. The analysis continues, by way of a discussion of Sovereignty, Rights and Duties, and Principles of Liability, to treat of ownership. Here there is a reference to the work of Hohfeld and to the recent articles by Mr. Kagan on usufruct as pars dominii in the *Tulane Law Review,* Vol. 20—but unfortunately not to the learned discussion in the same volume by Mr. J. W. Jones of the doubts cast upon the present value of traditional theories by recent exponents of 'control' and 'value' theories of ownership. In dealing with possession, the old dualism of possession in fact and in law is retained but is followed by the thesis that 'there is probably no consistent principle on which the cases can be recognised'. If the jurisprudence of exceptions can be so far disapproved perhaps the unhappy dualism may next be driven out, though the popular affection for possession 'in fact' is well demonstrated in the recent judgment of the Court of Appeal in *Brown* v. *Brash,* 64 T.L.R. 266.

The historical part deals with the sources and growth of law and the development of political society. In the brief space at the editor's disposal this is well done. His preference would seem to be for a codified rather than a binding precedent system and the objections to judiciary law are fairly stated; but to say that once such a system 'has matured it becomes unwieldy' (p. 93) and to support that statement by reference to America is to speak of maturity where over-ripeness is in point. The book concludes with chapters on the growth of individual rights and the decline of individual self-help.

The scope of this book is deliberately limited, and for that reason the almost total lack of reference to modern developments and writings on the Continent and in America is matter for regret but not criticism. Within that scope discussion is adequate and reference to authority frequent, though the student is perhaps too often embarrassed by the mere restatement of conflicting opinions unaccompanied by any comment from the learned editor.

G. D. G. HALL.

Juvenile Delinquency in an English Middletown. By Hermann Mannheim. [London: Routledge & Kegan Paul, Ltd. 1948. xi and 131 pp. 12s. 6d.]

Dr. Mannheim's Middletown is only anonymous on the title page of his book. At the beginning of his first chapter he explains why he chose Cambridge for his researches into juvenile delinquency; the main reason being the fact that the London School of Economics was evacuated there during the war. In spite of its special characteristics as the seat of one of the oldest universities, he considers the town, still primarily an agricultural centre peppered with a few light industries, typical for his purpose. In the war period it was also typical of a 'reception' area with its quota of evacuated mothers and children.

In the second of his five chapters the author analyses probation and supervision cases. Various conditions are dealt with as, for example, housing, family, the economic nature of the charge, the mental and physical aspect of the delinquent. He proceeds to methods of treatment, paying special attention to probation, remand homes, and approved schools. In the fourth chapter the author deals with special problems, and the last gives his principal findings, recommendations, and conclusions.

It is in this final chapter that the lay reader, as opposed to the expert, will find his reward. The book itself is full of statistics, figures and tables which, although most clearly set out, make stiff reading though relieved here and there by apposite illustrations of actual cases, but at the end there is an excellent guide to the findings of each section. When these findings have been absorbed by the reader it is well worth his while to go back over the appropriate statistics. With many of the conclusions drawn from them the average magistrate will not be surprised, for example, at the proportion of delinquents coming from broken homes, the high percentage of illegitimate children, or the fact that very few boys attend schools of higher than elementary standard. But facts such as that the new housing estates show a considerably higher incidence of juvenile delinquency than the town as a whole, that the majority of boys work in blind alley jobs, or that the families of boy delinquents had an average of more than four children, may well not have been appreciated.

It is clear from the author's recommendations that he has not been satisfied with the width of the material at his disposal for his researches. He worked on the records of the police, the probation officer, and the clerk to the justices, all in separate compartments, and therefore urges a central filing system whereby a case history can be properly traced. Dr. Mannheim would like to see more detailed reports made from the preliminary inquiries, including the social and psychological factors and at a later stage a much more complete follow-up of cases. With regard to the reports given to the court when the case comes up, the author complains that both the medical and school reports are too scanty, the medical report should not be the result of the last routine school inspection but an up-to-date and detailed one. He wants to see the routine intelligence test, as adopted in all cases by at least one juvenile court in this country, generally accepted. An extended use of the Child Guidance Clinics, and of psychological examinations, is advocated; this latter course will be made easier for juvenile courts under the new Act, since up till now the magistrates have had to face the question of who, if anybody, would pay for such examinations. With regard to school reports, these are often inadequate because head teachers have not appreciated exactly what was required of them. It might be said that the Bristol Juvenile Court has taken the enlightened course of inviting head teachers to watch their proceedings, and also to attend informal meetings with the panel at which difficulties on both sides can be explained and discussed. It seems important that although the head teacher may sign the report, the teacher who knows most about the child in question should supply the information. It has to be remembered that any adverse

criticism in the report must be read aloud to the parent present and can be challenged. Dr. Mannheim considers that the delinquent suffers if his offence is committed in the holidays, but with a good school welfare officer this difficulty need not be a real one.

The follow-up of delinquent careers is, as the author stresses, unsatisfactory at present. If a child is put on probation the court is informed of his progress during his period of probation. Reports are regularly made to a probation committee which, under the new Act, will have sub-committees acting as case committees, each dealing in detail with a given number of probationers. A stage further seems necessary for a proper follow-up, that is that the probation officer should note the child's progress and career over a number of years. If the probation order has a condition of residence in a probation hostel or home which necessitates the child leaving the town, the child comes under the probation officer of the locality in which the hostel or home is situated, and the report of him is made to that local probation committee. Dr. Mannheim does not agree with this, but it is established in the new Act, and thus unless there is the closest co-operation between the probation officers concerned the case is lost to the original court.

In the case of the approved school the follow-up is the most difficult of all. There is no machinery by which the committing justices hear of the delinquent again, unless they are keen enough to press for information; this is a bar to any researches on the subject, which Dr. Mannheim explores. At the same time a report can be asked for from the school, and it is then given, so that while the child is there information can be given or made available. The real difficulty arises when the boy or girl leaves, after-care then becoming the responsibility of the school welfare officer. A tactful probation officer may, however, have been able to keep in touch with the school, and especially with the boy's home, and thus continue to collect up-to-date information about him.

Not content with considering the delinquent boy or girl in his recommendations, Dr. Mannheim has also something to say on the problem of how to deal with his parents. He takes a practical view in accepting the fact that the type of parent most in need of reform is the least likely to be induced to go to suitable classes, or listen to appropriate radio talks. His constructive suggestion, that a probation order might be made against the parents found guilty of neglect or cruelty, is interesting, and indeed this section of the book is worth very special attention.

The whole book must be of great interest to all those who have anything to do with juvenile delinquency and its prevention. The teacher, child guidance and social worker, and the club leader, for example, might well read the book, and in doing so will realise of how much value their co-operation can be in such research work. Magistrates especially will welcome the book. They get impressions on the causes of delinquency from such cases as come to them, but it is often difficult to see the wood for the trees, and here they have their impressions confirmed or corrected by statistics of which they cannot fail to appreciate the value.

A. G. J. BRAGG.

MONOPOLIES AND PATENTS. A Study of the History and Future of the Patent Monopoly. By HAROLD G. FOX, PH.D., LITT.D., K.C. [London : Geoffrey Cumberlege, for the University of Toronto Press. 1947. xxvi and 388 pp. $10.]

DR. FOX'S eminence as a patent lawyer, writer, teacher and business man will predispose the reader who approaches the latest of his contributions to the subject, and the reader's hopes will not be disappointed. It is not a treatise on Canadian patent law (for Dr. Fox has already provided that) but a defence of the basic principle of the patent system, coupled with searching criticism of parts of it, leading to suggestions for reform.

The work is therefore strictly topical. It is all the more remarkable, therefore, that the author should have apportioned some 200 pages of the text and a further fifty-seven pages of the appendix to purely historical material, leaving just 100 pages for the systematic exposition of his thesis. The explanation lies in the fact that the book is a history of certain ideas, and especially of the idea of monopoly which from the late sixteenth century onwards has been charged with powerful emotions which even today are potent factors in the controversy over patent law. This historical discussion inevitably turns upon the great struggle which culminated in the *Case of Monopolies* (1602) 11 Rep. 84b, and the Statute of Monopolies (1624) 21 Jac. 1, c. 3. The story is well told and Dr. Fox's well-informed narrative makes excellent reading. Particularly valuable are the appendices of cases, state papers, proclamations and statutes; some of these are hard to find elsewhere, such as King James' 'Book of Bounty'. Dr. Fox is no doubt right in his contention that vague memories of the seventeenth-century struggle are sufficiently strong (especially in America) to make it easy to arouse passion by denouncing patents as 'monopolies'. It is a pity that the history has not been carried later; in England, at least, Lord Selborne was ready to abolish the whole system in the name of free trade.

In dealing with the present situation, Dr. Fox argues that the greatest sufferer from the present patent system in Anglo-Saxon countries is not the public but the patentee. He much prefers the Canadian and English system (which insists upon the exploitation of a patent) to the American (which does not). His principal criticism, however, is directed to the qualifications for patentability, and here the argument becomes once again a history of ideas and makes remarkably interesting reading. In their effort to decide whether a device is patentable as an 'invention' the courts have been led into the exploration of the psychology of invention, with the result that extreme uncertainty has been introduced; in its latest form in the United States this policy is associated with the formula 'a flash of creative genius'.

Dr. Fox contends that this is merely a subjective test in the mind of the court, and therefore unpredictable. His alternative is to be found in the French system under which attention is directed to the invention itself, and inventors do not appear before the court in the guise of examination candidates being *viva*'d to see if they have 'originality' or 'a flash of genius'. (Universities do not yet insist upon the latter quality, and are ready to reward patient, plodding research which reaches a useful result, although it may not avail a patentee.) Dr. Fox's suggestion that the French rule ought to be adopted raises interesting reflections. The French Act dates from 1844, and he cites passages from Kent and Webster showing that American opinion a century ago was the same. In short, it was characteristic of the beginning of the mechanical age to hold that 'so long as the subject matter of a patent constitutes a new industrial product, or new means, or a new application of known means for the obtaining of an industrial result, or an industrial product, the subject matter should be patentable'. The second century of the mechanical age demands more of its inventors; the cases which Dr. Fox criticises are not content with merely useful mechanisms; the patient plodding of research departments lacks the vital spark which is necessary to 'invention'. In this development the courts are probably in step with popular thought which is unaware of the gradualness of scientific advance; that, however, does not minimise the grave difficulties which arise from basing patentability upon the inventor's intellectual qualities rather than upon his product. The discussion of these main themes (and of some subsidiary matters such as proposals for administrative patent courts) is admirably conducted, pointed and apposite; the book is a pleasure to read. The index is hardly full enough, and the bibliography too full—the patent lawyer does not really need Maitland's *Domesday Book and Beyond.*

T. F. T. Plucknett.

UNFAIR COMPETITION AND TRADE MARKS. By R. CALLMANN. Three Volumes. [Chicago: Callaghan & Co. 1945. With 1947 Supplements. xxxii and 2,366 pp. $30.]

IN the preface the author regrets the fact that in the U.S.A. the law of unfair competition is in a 'logically disordered and incompletely developed state'. The mere fact that Mr. Callmann in Volume 3 prints 100 pages of statutes dealing with unfair competition and cites about 14,000 cases (approx. one-half on trade marks and another half on unfair competition) shows that America is far ahead of the United Kingdom in developing the law of unfair competition. In England we have a properly developed law of trade marks and passing-off. There are also rudimentary remedies against infringement of the right of trade names and against trade libels and pure fraud. Apart from these fragments, however, rules of fair competition are based on the ethics of the trading community rather than on the law. Sooner or later Great Britain will have to face up to the task of putting its law of unfair competition on a proper basis. At that time the excellent and comprehensive work of Mr. Callmann will be very useful, since he gives not only a full statement of the American law but delves deeply into the theory and underlying philosophy of the law of unfair competition. Starting from the leading case, *International News Service* v. *Associated Press,* decided by the U.S. Supreme Court in 1918, and the important minority judgment in that case, the author shows how unfair competition in the U.S.A. has become a legal concept and attempts to formulate maxims of competitive equity. He deals with phenomena like disparagement of competitor's goods, boycott, price war, denying the customer the opportunity to judge freely, misleading advertisements, theft of trade secrets, unlawful exploitation of a competitor's effort, fake judgments, etc. Special chapters are devoted to resale price maintenance, the role of the government in competition, and the anti-trust laws, as well as remedies and procedures.

Of special interest is a chapter on 'Price War'. Under the statutes of several American States it is illegal to sell below cost for the purpose of driving out competition, and this device may also constitute an offence against the Federal Anti-Trust Acts. The problem of the 'Chinese copy' of an article—short of infringement of patent rights and passing-off—apparently is as unsolved in U.S.A. as in England. Mr. Callmann explains that a manufacturer who has designed a complicated machine deserves protection against a slavish copy of all details even at a time when the patent has expired and the underlying technical idea has become free to the public. He shows that the present U.S. case law, in the same way as the English law, does not give that protection.

Volume 2 is devoted to trade marks. Unfortunately, since the book was published in 1945, the many changes in the American law brought about by the new U.S. Trademark Act of 1946 are dealt with only in the supplements. However, the author's commentary on the general principles of trade mark law and much of the case law he cites are still valid, and the author's answers to many difficult questions concerning the boundary between the law of trade marks and the law of unfair competition are of particular importance.

The three volumes containing, in the American manner, the fullest and most accurate information may appear slightly massive to the English reader. However, a lucid style and a clear exposition together with an excellent index render the book eminently interesting for British lawyers.

P. MEINHARDT.

MACDONALD ON THE CRIMINAL LAW OF SCOTLAND. Fifth Edition by JAMES WALKER, M.A., K.C., and D. J. STEVENSON. [Edinburgh: W. Green & Son, Ltd.]

THE legal profession in Scotland has long felt the need of an up-to-date standard work on the Criminal Law to incorporate the important judicial and

statutory developments of the past twenty years. The Clerk and Depute Clerk of Justiciary deserve well of their legal brethren for the service they have rendered in editing the fifth edition of *Macdonald*. Legal writers in Scotland perform an especial public service, as the market for their works is small and critical, while the reward of their labours is intangible rather than financial. The Criminal Law of Scotland has not been codified to the extent of the English Criminal Law during the past hundred years, and in the process of development of the Common Law by judicial decisions the textbook writer takes an honourable and essential part. It is a matter possibly for regret that Scottish jurisprudence still lives to so considerable an extent on the accumulated capital of recognised authoritative works which are too often out of date. Unless an author is elevated to the Bench his works are not strictly deemed authoritative during his lifetime. This results, as in England, in the expedient of re-editing from time to time the work of an accepted master on a particular branch of the law, thus retaining to some extent the authority of the author's name, without disclosing, however, which are his *ipsissima verba* and which the comments of his editors. Editing, like translating, imposes limitations.

In the present case, while acknowledging unreservedly the great services of the Editors, one is left with the impression that they have subordinated themselves, or have been subordinated, too much to the duties of editing. They have re-arranged and modified chapters dealing with a number of offences and have, inter alia, re-drafted the chapter on Indictment. Their mustering of recent authorities is valuable and exhaustive, while being also selective. They have drawn not only on the many Scottish decisions reported since the last edition was published, but have drawn on their own experience for a number of valuable unreported decisions. Further, they have referred in footnotes to the more important recent English decisions *in pari materia*, particularly in appeals to the House of Lords, which has, of course, no jurisdiction to hear Scottish criminal appeals. Too seldom, however, do the Editors venture a confident inferred opinion of their own, though there are a number of helpful exceptions, as in the discussion of *Semple* 1937 S.C.(J.) 41. One is tempted to regret that the Editors had not the freer hand of authors to publish an original work, rather than, in effect, further to dilute the authority of the learned and eminent Lord Justice-Clerk Macdonald. It is possible that the law of Scotland would have benefited even more by such an alternative, as when Gloag and Henderson ventured on the production of their admirable *Introduction to the Law of Scotland* (whose equivalent in England has not been written, to the loss of practitioners and students alike). And is not Professor Candlish Henderson, author of the accepted work on Vesting, fortunately very much alive ?

Messrs. Walker and Stevenson have discarded a certain amount of obsolescent matter such as the chapter on Cursing and Beating Parents—a practice which the present emancipated age possibly tends less to cultivate or reprobate than was the case in bygone days. The size of the work is reduced from 595 pages of text in the fourth edition to 364 pages in the fifth; and that reduction is not attributable merely to economy in footnotes and size of print. The present *Macdonald* is scarcely full or exhaustive enough to be a true equivalent of *Archbold* as the practitioners' 'Bible'. Though the common law offences are carefully treated, the needs of the present require considerably more detailed consideration than the Editors have permitted themselves of a number of statutory offences. Selection in this field is, of course, in practice inevitable. The original scope of the work may also have discouraged editors from dealing in much detail with statutory offences. Offences under the Road Traffic Acts, Wrongful Obtaining or Disclosing of Official Secrets, and offences against the Post Office Acts and Public Order Acts—to choose a few examples—have an importance in the life of the community which the author could not have foreseen. The Editors have contented themselves with little more than a bare reference to the existence of such offences. Though the leading authorities are cited, the topic of diminished responsibility might well have been more fully

developed. Again, in questions of adjective law, the summary of the points to be included in the judge's charge is not altogether comprehensive; while the new chapter on Indictments possibly unfortunately discards examples of styles and also certain passages on necessary specification of *locus*. The Editors are, moreover, silent as to the competency or otherwise of a submission by the defence of 'no case' at the close of the prosecution's case, without prejudicing thereby the right of the defence to call evidence if the court rejects the submission. Comment on this controversial point (which was left open by the Lord Justice General Normand and the other judges in the unreported case of *Levin* in 1944) would have been very welcome from such experienced authorities as the Clerk and Depute Clerk of Justiciary. The new Index seems not to fulfil all the Editors' hopes. A more extensive system of cross-references is desirable in a work like that reviewed, as a point has often to be taken on the spur of the moment in the course of a criminal trial. As an example: reference to extra-judicial admissions by the accused is not to be found under 'accused', 'statement', 'admission' nor 'confession', but under 'Evidence', sub-head 'competency'.

None of the above suggestions, which refer mainly to points of detail, should be taken as at all disparaging the real value of the fifth edition of *Macdonald*. It deserves a place on every practitioner's shelf, and the Editors merit congratulation on the service they have rendered by devoting their time, learning and experience to the unquestioned advantage of the administration of criminal justice in Scotland.

T. B. SMITH.

THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany. [London: H.M.S.O. 1947, Part 14, 408 pp., 7s.; 1948, Part 15, 422 pp., 7s.; Part 16, 395 pp., 6s. 6d.; Part 17, 366 pp., 6s.]

THE 1,600 pages contained in these four volumes cover the six weeks from May 14, 1946, to July 1, 1946. During that period the Nuremberg Tribunal continued its hearing of the case for the defence. After the conclusion of the case for Doenitz and Funk, the court heard evidence on behalf of Raeder, Schirach, Sauckel, Jodl, Seyss-Inquart, Papen, Speer, Neurath, Fritzsche, and the period closes with the Tribunal listening to the defence of the absent Bormann. Most of the material in these volumes is straightforward and interesting only from the general or political point of view, for it was concerned with controverting the case presented by the prosecution, and only occasionally did matters of legal interest arise.

Perhaps the general mentality of the German High Command in connection with war and the laws of war becomes clear from the statement of Raeder that he could see nothing wrong in issuing orders for the immediate destruction of Russian submarines six days before the attack on the Soviet Union commenced (14, pp. 214–5). In view of the course of events at Pearl Harbour it is perhaps not unreasonable to suggest that the Axis method of opening hostilities was the result of a joint plan.

Had the British *Manual of Military Law* as originally published contained an authoritative declaration of the law concerning superior orders as a defence, and had the Nuremberg Tribunal been permitted to recognise that defence, the present volumes make it apparent that each of the major war criminals accused at Nuremberg would almost certainly have been acquitted, for the proceedings are full of statements to the effect that the particular accused

would never have done what he did had he not received direct orders from Hitler, and no one would dare to question the *Fuehrer*.

An interesting point arose during the cross-examination of Schirach. Prosecution counsel asked that the accused should be prevented from speaking with his counsel during a recess of the Tribunal during the course of the examination; when, however, it was pointed out that the recess would last over the week-end and two days' silence would be a heavy handicap from the point of view of the defence, Lord Justice Lawrence agreed not to enforce the prohibition, even though 'it is the British rule' (14, p. 408).

It is often maintained that international law is not really law, particularly in view of the frequency with which its rules are disregarded. Jodl was clearly not one of those who would deny the validity of international law, for throughout his evidence he referred to the rules of that system in order to justify or explain the reason for certain terror orders being issued. During his evidence he was confronted with a table which detailed infractions of international law by Germany and by the Allies as early as September, 1938. Jodl maintained this analysis was not compiled with the intention of committing similar breaches but merely to clarify certain matters, for 'I knew that never yet in this world has there been a war in which infractions of international law did not occur. . . . I considered and valued international law with which I was well acquainted as a prerequisite for the decent and humane carrying on of the war' (Part 15, p. 314). In the light of statements like this it becomes impossible to suggest that the accused at Nuremberg were unaware of the regulations contained in the law of war and of the penalties attaching to breaches of that law.

Herr Schuschnigg has recently published his account of what took place in 1938 at the time of the *Anschluss* between Austria and Germany. This account has been published under the title of *Austrian Requiem* and students of politics and international relations would be well advised to read it in conjunction with the account of the same events given by Seyss-Inquart and the witnesses called on his behalf (16, pp. 67–220, *passim*).

Perhaps the most interesting part of the four volumes under review is that devoted to the proceedings on July 1, 1946, for there is to be found the first forty pages of the evidence concerning the responsibility for the massacre of Polish troops at Katyn (17, pp. 326–66). Evidence for the defence was to the effect that after the Germans moved into the Smolensk area in August, 1941, no Poles were to be seen, and that it was only by accident that the first human remains were found. After the bodies were exhumed in 1943, about a year after the discovery of the bones, the German scientists estimated that death occurred in 1940, that is when there were no Germans but only Russians in the region. The witnesses for the prosecution on this matter, both scientists and laymen, emphatically denied the evidence of defence witnesses, but in view of the fact that the evidence on the issue has not all been published, it is impossible as yet to draw any conclusion in the matter.

Difficulties often arose during the proceedings because of the large number of defence counsel who wished to examine witnesses. This was particularly clear in connection with Katyn. In order to save time the Tribunal refused to admit examination by anyone who was not defending an accused actually involved in the allegation, and it was decided that membership of the German Cabinet at the time that the massacre was alleged to have taken place was not of sufficient proximity to warrant examination of witnesses. Defence counsel grudgingly agreed to this arrangement (17, pp. 333–4, 344), but if it had not been insisted upon the length of the trial would have been inordinately greater than it was, for this was only one example of many similar instances.

L. C. Green.

THE CONFLICT OF LAWS. By R. H. GRAVESON. [London : Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. 1948. xxxii and 394 pp. 30s.]

IT is probably no exaggeration to say that the Conflict of Laws is a branch of the law to which an amount of scholarship and research has been devoted that is almost disproportionate to the limits of its application. Numerous textbooks are available. Their quality is of the highest. No addition to their number is required, however desirable monographic work may be in many respects. Yet Professor Graveson is no doubt justified in suggesting (p. v) that there exists a need for a book 'written primarily for students approaching the conflict of laws for the first time'.

Professor Graveson decided to write such a book, but he has produced a work that comes very near a textbook on established lines rather than a guide for beginners. It is therefore not easy to set the standard by which it should be judged. To judge it as a textbook, as something that it perhaps is, but is not intended to be, would mean doing less than justice. On the other hand, as a first introduction the book is perhaps a little too heavy to make a difficult subject palatable to beginners. The freshman, it is feared, will probably require something much more direct and elementary, a description of the wood rather than of the trees, and if he has overcome the first obstacles, he will inevitably turn to Professor Cheshire's treatise. To confront the student, almost at the beginning of his journey, with a chapter on the most difficult of all topics, *viz.*, Classification, requires courage. And it is doubtful whether he will derive assistance from the division of the subject into three parts: Primary Concepts (which comprise marriage and particular forms of status, but from which public policy is excluded), the Validity of Legal Acts (a part which also deals with the interpretation of legal acts) and the Jurisdiction of English Courts (a part including such matters as torts, succession and the recognition of foreign judgments).

There cannot, however, be any doubt that Professor Graveson has produced a reliable and attractively written work which propounds the existing law with accuracy and care. A great deal of material has been pressed into a relatively short volume. The author has avoided the danger of overburdening the student with an excessive discussion of literature, with mere speculation or theory. Nor has it been his ambition to confuse the reader by his own views, which are only rarely alluded to. Altogether the subject has been treated with such conservatism and restraint that those who have mastered the book are well prepared to face the most orthodox of examiners. The number of flaws is very small. Though it is perhaps ungracious to refer to some of the few that could be discovered, the purist cannot help objecting to the statement (p. 5) that 'individual principles of the conflict of laws form an integral part of the branch of law to which they relate. Thus the rule that the validity of a contract as to form depends on the law of the place where the contract is made is equally a rule of conflict of laws and of the law of contracts'. The omission to distinguish between legitimation by acknowledgment and adoption (p. 132) is a matter which could readily be rectified. On pp. 154, 155, the author creates the impression that the *Vita Food Products Case* had affirmed rather than demolished the doctrine that a contract, valid by its proper law, is invalid, if it is illegal by the *lex loci contractus*; nor is it possible to welcome in this connection Professor Graveson's distinction between mandatory and directory prohibitions, which is said to be derived from the distinction between *jus cogens* and *jus dispositivum*. The appearance of a new word 'conflictual' (p. 213) should be noted. On p. 281 a reference to *Hartmann* v. *Koenig* (1933) 50 T.L.R. 114 would perhaps have led to a shifting of the emphasis.

These, however, are minor matters. They do not affect the conclusion that this is a book to which both teachers and students will extend a hearty welcome.

F. A. MANN.

THE EXPORT TRADE. A Manual of Law and Practice. By CLIVE M. SCHMITTHOFF, LL.M.(Lond.), LL.D.(Berl.), Barrister-at-Law. [London: Stevens & Sons, Ltd. 1948. xxxii and 393 pp. 17s. 6d. net.]

THIS is one of the few books of which it can truly be said that it meets a long-felt want. Hitherto the task of a lawyer called upon to advise an exporter has been made doubly onerous because of the difficulty of ascertaining from him or anyone else the exact details of the business operations involved. These transactions are largely based on unwritten mercantile custom and in so far as there have been written sources these have consisted of a variety of business documents, trade and departmental journals, and publications on commerce and economics with which the lawyer was unlikely to be familiar. Even when he had grasped exactly how the arrangements worked, he might find it necessary to refer to a number of different law books since many types of commercial contract (sale of goods, affreightment, insurance, banking, etc.) and legal regulations (Exchange Control, Income Tax, Customs and Excise, etc.) would be involved.

Dr. Schmitthoff's masterly summary of the commercial practice and the law applying to it gives him exactly what he has been waiting for, since it describes the business transactions and summarises the legal rules applying to them. In a comparatively small space and in readily understandable form it analyses the various types of export sale, and deals briefly with exclusive sale agreements, foreign agencies, foreign branch offices and subsidiary companies, joint export organisations, double taxation agreements, bills of exchange, commercial credits, export credit guarantees, marine and aviation insurance, carriage by sea and air, arbitration, export licensing, exchange control, customs formalities, and relief from purchase tax. It also contains a useful appendix of addresses. The result is a book which should be invaluable to the business man and which no commercial lawyer can afford to be without. It can also be read with advantage by advanced students of commercial law who want to see how this works in practice.

The summary of contents given above will have indicated the range of Dr. Schmitthoff's researches and it is inevitable that the result should sometimes whet rather than satisfy the reader's curiosity. The author quotes in footnotes a number of the many sources to which he must have referred, but it would be helpful if in the next edition he were to collect these in a bibliography indicating in particular the relevant non-legal publications and the nature of their contents when this is not apparent from their titles. Over-simplification is noticeable in places, particularly in the treatment of bills of exchange, which is perhaps the least satisfactory section. In a book of this size a detailed discussion of the notoriously obscure section 72 of the Bills of Exchange Act would be out of place, but it is hardly helpful to set out this section verbatim without a word of explanation (p. 138), and it scarcely seems fair to our parliamentary draftsmen to do this immediately after quoting the dictum that this statute is the 'best drafted Act of Parliament ever passed'.

It is also suggested that when dealing with the pitfalls of local legislation applying to a foreign branch office or subsidiary a warning might be added about possible social legislation which may force employers to secure pensions for their workmen, perhaps on a crippling scale. The English practice of financing social security by taxation is by no means universal; some countries (notably in S. America) consider it more profitable to impose this liability on the individual enterprise rather than the national exchequer.

One final small criticism is that, whereas Dr. Schmitthoff rightly emphasises (p. 317) the need to ensure that the contractual method of payment for exports complies with the English exchange control restrictions, he omits to point out that it is at least equally necessary to ensure that the foreign payer complies with the restrictions in force in his own country. This is particularly important

in the light of the Bretton Woods Agreement Order in Council and the interpretation put upon it in *Frankman* v. *Anglo-Prague Credit Bank* [1948] 1 K.B. 730.[1] This decision is too recent to have been dealt with by Dr. Schmitthoff, but apart altogether from the doubts which it raises on whether the vendor will have a right of action in England, what the business man wants is not a right of action for breach but the smooth fulfilment of his contract, and if he is to obtain this he must ensure that the restrictions in both countries are complied with.

In general, however, this book seems most comprehensive and accurate. Congratulations are due to Dr. Schmitthoff for a really valuable contribution to legal literature and also to his publishers for producing a book which is a joy to handle and read and for selling it at a price which is most moderate.

L. C. B. G.

CHITTY'S LAW OF CONTRACTS. Twentieth Edition, under the general editorship of HAROLD POTTER, LL.D., Barrister-at-Law. With First Supplement by BARRY CHEDLOW, Barrister-at-Law. [London : Sweet & Maxwell, Ltd. 1947 (Supplement 1948), ccxi and 1,307 pp. £3 10s. 0d. net.]

IN the case of so well established a work a brief word of welcome to a new edition would normally suffice. But something more is appropriate in the present case because Professor Potter and his team of able collaborators have taken the opportunity of making a number of drastic revisions. The main part of the work, that on the general law of contract, has been substantially rewritten, principally by Sir Charles Odgers, and is now half as long again as in the previous edition. The result is a vast improvement and the only real criticism of it is one which applies to the book as a whole, namely, that the almost total exclusion of any reference to so-called emergency legislation renders it less valuable to the practitioner than it could and should be. This doubtless deliberate omission lends an air of unreality to certain sections of the book. The type of question which today the practitioner constantly has to answer is: Was my client allowed by the regulations to make the profit which he alleges he has lost, and was the method of payment provided in the contract in accordance with exchange restrictions? But there appears to be no reference to either Price Control or Exchange Control Regulations. It is not suggested that either topic is one which could be dealt with in detail but the practitioner should surely be warned that this and similar legislative interferences with freedom of contract must constantly be borne in mind. The reader of this book might reasonably suppose that the two chief examples of statutory invalidity are sales of offices and charges on benefices; his experience is unlikely to confirm this. In a students' book it may be permissible to ignore anything that can be classed as emergency legislation (even if the emergency looks like being prolonged), but the practitioner who ignores it will live (and not for long) in a fool's paradise and a book for his guidance should not ignore it either.

To make room for the increase in the main section, cuts have been made in the treatment of special subjects, which are now limited to the following: Sale of Goods, Hire-Purchase, Bailments, Carriage, Banker and Customer, Guarantees and Indemnities, Loans, Lotteries, Gaming and Wagering, Agency, Partnership, Employment, and Contracts relating to Marriage. These are dealt with by a variety of different editors, all experts, but who hardly have scope to do themselves justice. Moreover, this variety necessarily leads to divergencies of treatment. Thus the section on Agency does not in fact deal with the contract of agency but only with contracts with agents, while the

[1] Reversed on other grounds, [1948] 2 All E.R. 1025.

section on Partnership is not similarly limited but consists of an elementary treatment of the law of partnership. It is a little difficult to see the justification for such divergencies. This criticism is not based on grounds of logic, for it is conceded that logic is not the test (if it were it would be impossible to support the exclusion of Sale of Land, if Sale of Goods is included—an exclusion which is thought to be entirely sound). It is submitted that the test for inclusion should be: What would the practitioner expect to find in a general book on contracts and what can be dealt with there in sufficient detail to meet his requirements? Judged by this test it is suggested that further pruning is required and that all special contracts except Sale of Goods and Hire-Purchase, should be excluded; the chapters on Agency and Partnership being restricted to a consideration of contracts with agents and partners respectively. It is believed that a practitioner would not use this (or any other) general textbook for reference on any of the other specialised contracts, nor would he be well advised to do so, for the treatment of them is necessarily superficial (for example, the chapter on Banking consists of little more than a copy of the Bills of Exchange Act with an elementary commentary). When Joseph Chitty originally published his treatise on the Law of Contracts in 1826 it may have been possible adequately to cover all forms of contract then known in one volume; now it is not. Professor Potter has recognised this, but has not carried this recognition to its logical conclusion by converting the book into one on the Law of Contract (without an 's'). In such a book it is thought that Sale of Goods and Hire-Purchase merit inclusion, the former because it is the most common and typical type of contract and because its treatment can hardly be divorced from the general law of contract, the latter because it is closely entwined with the sale of goods and scarcely merits separate treatment in a full-sized practitioner's textbook. But if they are to be dealt with they must be treated at adequate length. The present chapter on Sale of Goods is little more than a commentary on the Sale of Goods Act and does not deal, as surely it should, with the obligations of buyer and seller under c.i.f., f.o.b. and other recognised types of commercial contract. The chapter on Hire-Purchase also seems inadequate; for example, it does not even refer to the existence of the Hire-Purchase and Credit Sales Regulations presumably because of the dubious policy, already referred to, of ignoring emergency legislation. If the chapters on the other special contracts were excluded, space could be found for the needful expansion of the treatment of these two, and it is believed that the practical value of the book would be greatly increased. Moreover, it could then become a unified treatise once more, instead of an anthology with inevitable divergencies of style and treatment.

These remarks are not intended as carping criticisms but as constructive suggestions from one who has used the book extensively in practice in the past and who intends to make equal use of it to his continued profit in the future. A book that was born in 1826 and is still going strong has obviously (as they say) got something, but it is possible that at present it has got too much and that recent editions have been begotten by too many.

The publishers deserve congratulations upon a handsome piece of book production which justifies the high price.

It is intended to keep the book up to date by periodical supplements, the first of which (to May, 1948) has now been issued. This deals with over seventy cases, decided since the issue of the main work, the most important of which is the *High Trees Case*, to which Mr. Chedlow devotes over a page of text without, however, referring readers to Cheshire and Fifoot's article in 63 L.Q.R. at p. 283.

L. C. B. G.

THE LAW OF NEGLIGENCE. By J. CHARLESWORTH, LL.D., of Lincoln's Inn, Barrister-at-Law, Recorder of Scarborough. Second Edition. [London: Sweet & Maxwell, Ltd. 1947. lxxxviii and 661 pp. 70s net.]

THERE has for so long now been considered to exist an antithesis between the academic and the practical lawyer's approach to law that a peculiar danger may seem to be involved in handing this very practical textbook to an academic teacher of law for review. Will not the reviewer tend to lay the main emphasis of his remarks on general principles and juristic discussion of difficulties in the law of tort? The answer is Yes. The present reviewer will in fact measure his remarks against these 'academic' standards precisely because, in his respectful opinion, the differences mentioned between the practical and academic viewpoints are obsolescent and in rapid course of absolute refutation by modern integrative tendencies. So far as the substantive law is concerned, the only real difference between the two is that whereas the academic lawyer is given by his calling the leisure to examine the impact of new decisions on principle and to advance broad interpretations, the practitioner is precluded from this necessary work by the pressure of the day-to-day business of law. But the work of the two is not antithetic, it is complementary, the obverse sides of the same process of legal development. This is a fact that is meeting with more and more extensive recognition today; it is re-echoed by distinguished writers and speakers, and finds convincing illustration in the mounting references by judges to juristic writings for support in pronouncements of principle.

In the whole field of legal writing it is probable that the ideal meeting-place of the academic and practical methods is to be found in the monograph that treats of a selected topic in the same special field of law. In such a work there is the time and space in which to engage upon complete analyses of major concepts and principles, including consideration of the most significant juristic thought, and to support and illustrate these with massive case classifications of the practitioner's kind. Even for the practising lawyer a tabloid knowledge of precedents, however exhaustive, is not enough. To render his legal equipment perfect there must be an exact appreciation of those principles and concepts that set the direction and determine the nature of future legal growth.

On reading the second edition of Dr. Charlesworth's valuable work one cannot help experiencing a feeling of disappointment at the lightness of treatment accorded to subjects of great general importance and no little difficulty in the law of negligence and adjacent topics. No mention is made, for example, of the changes that have been rung on the duty of care concept in addition to Lord Atkin's test.[1] Again, the topics of volenti non fit injuria, remoteness of consequences and dangerous things would seem to demand a more fundamental analysis: the assertion that 'consent means an agreement' (at p. 506) provokes in the reader's mind an immediate outburst of questioning which is left unsatisfied; and the very limited role of the 'immediate physical consequences' test in *Re Polemic* needs (in the reviewer's opinion) to be underlined and described; then, the statement that the distinction between things dangerous *per se* and things dangerous because defective 'is rather obscure' (at p. 343) demands, it is felt, a more subtle examination of the problem than the solution implied in the arbitrary and inadequate definition of dangerous things set out on p. 231.

[1] A suggestive starting-point for discussion is afforded by W. L. Morison in his article 'A Re-Examination of the Duty to Take Care' (1948) 11 Mod.L.R. 9.

At p. 238 Dr. Charlesworth submits 'that liability under *Rylands* v. *Fletcher* is based on the escape of the dangerous thing from land in the occupation of the defendant and that if the escape causes damage there is no necessity to satisfy the further condition that the presence of that thing on the land constituted a non-natural use of the land'. Clearly, this is too wide and sweeping a statement of the law on the footing of present authorities, but it is, it must be admitted, a very bold attempt to overcome the acute problem that emerges at this point of defining natural and non-natural user of land. In this connection it is perhaps not out of place to suggest that, in the light of recent dicta in the House of Lords' decision of *Read* v. *Lyons*, Bohlen's essay on the rule in *Rylands* v. *Fletcher* may have fresh meaning for English law and English lawyers.

Further points of a minor kind which are of some interest may be added. First, as a matter of purely personal opinion, the present reviewer must disagree with the author's presentation of the 'delegatee-cases' (at pp. 63–5). It should, it is respectfully submitted, be made clear that between *Samson* v. *Aitchison* and *Hewitt* v. *Bonvin* a real shift in the law took place, a movement from the service-principle of retention of control to the agency-principle of implied authorisation. In the second place Dr. Charlesworth's ultimate criticism of *Bourhill* v. *Young* (at p. 567) does require elaboration, namely, that 'as the fishwife "suffered substantial damage and suffered it owing to the conduct of the cyclist", there would seem to be some defect in the law which does not provide her with a remedy against him'. Does Dr. Charlesworth mean by this to support the 'general theory' of the foundation of tortious liability? It is not really sufficient to follow up the quoted words with a case under the Workmen's Compensation Acts. The analogy between the latter and the common law of negligence is (in our submission) a false one, for the purposes of the two heads of law are different and it is their diverse purposes that have given to the respective rules of law their separate and different shapes.

Next, there are two small points: it is surely not quite correct to say that 'the doctrine of scienter applies to trespass when the ordinary consequences of trespass are being ascertained' (at p. 338). Remoteness of consequences in the context of cattle-trespass simply involves a specialised application of the 'reasonable foresight test'. And, as a matter of arrangement, it would, in the reviewer's opinion, be more natural to deal in a single chapter with the subject-matters of Chaps. 18 and 21, namely, the law relating to Factories and Mines and Breach of Statutory Duty.

A final matter remains for comment. Just as the author's analysis of principle is, in our opinion, incomplete, so too are his references to juristic writings. It is true that some textbooks and some articles are mentioned in the footnotes, but the policy which led to the exclusion of many writings of importance is not really clear and might well be reconsidered.

In reviewing a substantial work like the present one, wherein a lawyer's disagreement between author and reviewer must inevitably arise at many points, it is a difficult matter, after concentrating on criticism, to readjust the balance so as to leave the reader with a well-proportioned view of the positive virtues and merit of Dr. Charlesworth's book. Indeed, as the work is in keeping with its author's high reputation, it is well-nigh an impertinence to lay stress on its merit: it goes without saying. One should emphasise, therefore, that the major criticisms of substance advanced above have been *stimulated* by Dr. Charlesworth's book. It is a large-scale work that forms a very valuable collection of authority, accurate in its scholarship, suggestive in its joinder of negligence with liability for dangerous things and always lucid in exposition, as befits its author. For the lawyer who has a special interest in tort, it is a fruitful book. Certainly, the reading of its six hundred-odd pages has afforded the present reviewer a great deal of pleasure.

C. Grunfeld.

A DIVORCE HANDBOOK, including other Matrimonial Causes. By S. SEUFFERT. [London : The Solicitors' Law Stationery Society, Ltd. 1948. xxviii and 192 pp. 17s. 6d. net.]

PROBATE AND DIVORCE HANDBOOK. By D. PERRONET REES. Second Edition, revised and enlarged. [London : Butterworth & Co., Ltd. 1948. xlviii and 439 pp. 27s. 6d. net.]

NOTES ON MATRIMONIAL CAUSES PROCEEDING IN DISTRICT REGISTRIES. By THOMAS STANWORTH HUMPHREYS. Second Edition, revised. [London : The Solicitors' Law Stationery Society, Ltd. 1948. 82 pp. 7s. 6d. net.]

THE first book covers the general field of matrimonial causes and sets out to be of use to practitioners, students and social workers who need to acquire a general knowledge of the subject. It consists of seventy-five pages of text, a well chosen selection of precedents of pleadings and an appendix containing the Matrimonial Causes Rules, 1947, and the principal relevant statutes.

The book has grown out of the author's excellent annotations to *The Matrimonial Causes Act,* 1937 (Solicitors' Law Stationery Society, 1937; Second edition, 1944). This parentage, worthy though it is, is the book's source of weakness as the text, although admirably accurate and enlightening, suffers from excessive compression; a style of writing appropriate to noting a statute but not really suitable for a handbook, particularly one intended to include the interested layman amongst its readers. It also accounts for the fact that the part of the book dealing with divorce and nullity is infinitely more complete to that dealing with summary jurisdiction, which is somewhat sketchy.

These few remarks of general criticism are not intended to decry the otherwise considerable merits of this book. A month's constant use in chambers has not found the index wanting on any one occasion, and the text has invariably been illuminating and led to the speedy discovery of the relevant authority. There can be little doubt that this book deserves a place in the libraries of practitioners and students alike.

Perronet Rees' *Probate and Divorce Handbook* provides (quoting the author's preface) 'in one compact and easily carried volume the requisite information as to the law and practice in non-contentious probate and divorce, which the practitioner engaged in such business requires in the course of his work from day to day'. It is difficult to imagine a book which achieves its purpose with greater excellence. In its four hundred-odd pages it covers both divorce and probate with equal thoroughness, and as one would expect of its author, is remarkably well arranged, complete and reliable. Amongst its many good features the number of precedents is particularly valuable to the practitioner.

Thomas Humphreys' *Notes on Matrimonial Causes Proceeding in District Registries* is a helpful commentary on the Matrimonial Causes Rules, 1947. It is a pity that no room has been found to include the rules themselves, but apart from this complaint this small work can be strongly recommended as a safe guide to all those who have the conduct of matrimonial proceedings in District Registries.

H. B. GRANT.

A HANDBOOK ON THE DEATH DUTIES. By H. ARNOLD WOOLLEY, Solicitor of the Supreme Court. Sixth Edition. [London : The Solicitors' Law Stationery Society, Ltd. 1948. xxxv and 349 pp. 27s. 6d. net.]

THE popularity and usefulness of this book is attested by the exhaustion of the fifth edition despite its reprint in 1946; this last edition was comprehensively

reviewed at 9 M.L.R. 208–9, so that only the important changes made in the sixth edition require noting. The arrangement of the chapters has been somewhat altered and much new matter added owing, in the main, to the important changes made by recent Finance Acts—with the result the work has been lengthened by nearly eighty pages. The main additions relate to the relief in respect of double taxation given by the Finance (No. 2) Act, 1945 (pp. 86–101) and the changes resultant from the provisions of the Finance Acts, 1946 and 1947, relating to alterations in the rates and incidence of the duties and to the increase in the period during which liability attaches in respect of *inter-vivos* gifts; Mr. Woolley calls attention (p. 178) to the serious difficulties arising from the doubling of succession and legacy duties as regards settled estates, cf. section 49, Finance Act, 1947. Though published before the Finance Act, 1948 became law, Mr. Woolley refers in his Preface to the effect of section 76 of this Act which apparently reverses *Barclays Bank, Ltd.* v. *Att.-Gen.* [1944] A.C. 372 as regards persons dying after April 7, 1948. Other noteworthy additions are sections regarding 'Special Methods of Payment' (pp. 23–6), 'How the Estate is Valued' (Chap. VIII) an enlargement of the Chapter (XVI) on 'Mitigating the Duties' and a section dealing with the valuation of 'tax-free' annuities (pp. 130–1) in which the implications arising from *Berkeley* v. *Berkeley* [1946] A.C. 555 are discussed.

In his Preface Mr. Woolley calls attention to four reforms in the law relating to the Death Duties which he considers require urgent consideration, namely, easing the burden in respect of 'quick successions', a new Act embodying all the legislation on the subject some of which dates back to 1796, revision of the system of 'aggregation' for Estate Duty purposes and payment by the Inland Revenue of the taxpayer's costs of appealing to the higher courts in proper cases.

The present edition has bettered the excellent earlier editions and your reviewer can do no more than repeat his previous encomium that this is a most useful work, not only for the practising lawyer for quick reference and the practical application of the duties but also for the student as a general introductory work to the subject; the last three editions of this work have been prescribed by the Law Society for its Final Examination candidates.

A. Farnsworth.

Zivilprozessrecht, Eine Systematische Darstellung. Adolf Schönke (Professor at the University of Freiburg). Fourth Edition. [Karlsruhe: Verlag C. F. Müller. 1948. xii and 443 pp. 16 DM.]

Zwangsvollstreckungsrecht, Eine Systematische Darstellung. Adolf Schönke (Professor at the University of Freiburg). Fourth Edition. [Karlsruhe: Verlag C. F. Müller. 1948. x and 279 pp. 9 DM.]

Professor Schönke's two books have in the course of a few years attained considerable popularity among German lawyers. They form at present the only fairly up-to-date guide to the German law on civil procedure and enforcement of judgments. There is no doubt that they deserve the appreciation which they have found. The author knows how to write clearly and attractively. He illustrates his propositions by many well-chosen examples from the practice of the courts. Occasionally he refers to comparative law for further elucidation of important points. The present edition is a reprint of the third edition, which appeared in 1946. There are naturally not a few points with regard to which the work is now no longer fully correct. The amendments of the Code of Civil Procedure enacted by the Central Legal Office in the British Zone, the creation of the High Court for the Combined Economic Area and that of the Supreme

Court for the British Zone—all events of first rate importance—have not yet been taken into account. The isolation of German legal science from the rest of the world has also led to some mishaps in the references to foreign legal literature. Thus the author's list of sources of English civil procedure contains neither the *White Book,* nor Odgers' *Pleading and Practice,* nor the *Encyclopedia of Court Forms and Precedents* and last but not least also not that veritable mine of information for any student of the English law of civil procedure, Dr Jackson's *Machinery of Justice in England.*

What is perhaps a more serious matter in a book intended in the first instance for students is the almost complete absence of historical references or of a brief survey of the history of German civil procedure. Dr. Schönke's intention clearly was to write an austerity book, in other words a book that gives all the material that the practitioner needs—but not more. The result of his endeavours is a work that is completely reliable as a statement of the law that was in force when it was written. But the inspiration that a student could derive from works like the treatises of Richard Schmidt or the shorter work of Friedrich Stein are as absent from his work as the profundity of Adolf Wach's famous first volume or the intellectual penetration of Konrad Hellwig.

In this country we have not yet developed a science of the law of civil procedure. English lawyers, desirous to know what science can achieve, will find little to satisfy their curiosity in this work. For them Carnelutti's great *Sistema di Diritto Processuale Civile*—with all its weakness—will still remain a better introduction to a branch of scholarly endeavours whose non-existence in this country has helped to frustrate many well-meant reforms during the last seventy-five years.

E. J. COHN.

LOCAL COUNCILS AND THE CITIZEN. By R. SIMON, M.A., Assistant Solicitor, City of Kingston-upon-Hull. [London : Stevens & Sons, Ltd. 1948. ix and 197 pp. 5s.]

THIS small paper-covered book in the series 'This is the Law' is, for its purpose, very good indeed. The layman for whom it is designed is perhaps a somewhat elusive gentleman; he who does not know a considerable amount about the powers of local authorities must be blind and deaf, unmarried and without a roof over his head and (in those circumstances) ignorant of the welfare services for handicapped persons. But the citizen often has not a clear, broadly drawn, picture of the complete structure. This book will give it to him. The need for interest in local government cannot be over-stressed; properly met it could transform representative government into democracy.

The chief criticism to be made is that the presentation is too matter-of-fact. There is no dullness but, clarity of exposition apart, there is on the other hand not much light. The author rides on a tight rein and never gives his mount its head. There may not have been space for the past of local government; but surely a page could have been spared for its future. I did not notice one expression of personal opinion. But, indeed, even this criticism is perhaps unfair for the purpose was exposition not comment, and the citizen will not buy this book, it may be said, to read what another citizen thinks of the matter, but to discover what the matter is. For once the blurb accurately describes the content which does provide 'a compact and practical guide to assist any citizen, whether elected councillor or not, to obtain a better knowledge of the extent of the powers and duties of his local council'.

J. A. G. GRIFFITH.

LEGAL EFFECTS OF WAR. By SIR A. D. MCNAIR. Third Edition. [Cambridge : The University Press. xxiv and 458 pp. (with index). 25s. net.]

WE reviewed the second edition of this book, which was in effect a new work, in 8 Mod.L.R. p. 86. It is unnecessary to discuss the present edition at such length as apart from a few minor amendments, and the noting of the surprisingly few decisions which have occurred since 1944, when the second edition appeared, the only alterations in the book consist in the addition of a number of chapters to the appendix. These consist of the text of two statutes (the Law Reform (Frustrated Contracts) Act, 1943, and the Limitation (Enemies and War Prisoners) Act, 1945) and two articles which have appeared in learned periodicals, *viz.*, a commentary on the 1943 Act and an essay on the requisitioning of merchant ships.

C.

THE LAW OF TRADE UNIONS. By H. SAMUELS, M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law. Third Edition. [London : Stevens & Sons, Ltd. 1948. xv and 96 pp. 6s. net.]

INDUSTRIAL LAW. By the same author. Third Edition. [Sir Isaac Pitman & Sons, Ltd. 1948. xix and 252 pp. 16s. net.]

THESE two new editions of Mr. Samuels each represents the steady demand with which the author's books have deservedly met. Both are of a purely expository kind, in which the close analysis of difficult law gives place to a lucid enunciation of main and established rules.

More particularly, the former affords a very useful handbook of the working rules of trade union law. Its value may possibly be more appreciable in the case of the layman in daily contact with trade union relations than in the case of the lawyer, whose need is, of course, for a work of greater intensity of detail. None the less, the student who is initially approaching a study of industrial law in general and trade union law more especially, will undoubtedly derive considerable assistance from Mr. Samuels' book. It forms an accurate and concise account of its subject-matter, including a neat summary of the effect of the most important legal change in trade union law since the last edition two years ago, that is to say, the Trade Union Act of 1946. It might be added that the only quarrel the reviewer had with this little book was that he felt that pp. 18–19 on trade union agreements as to terms and conditions of service might have been somewhat expanded in view of the great importance of this topic.

The second, a more substantial volume on industrial law, covers a very wide field in the course of its two hundred-odd pages. Unlike other similar works of an introductory nature, the present book has—and rightly so in the reviewer's respectful opinion—its centre of gravity in the statute law relating to employment. No more than forty to fifty pages are expended on the related common law, including the apprentice's contract. This severe condensation of material, for which normally only a lengthy treatment is adequate, may well explain the oversights that came to the reviewer's notice. On the first page of the book the statement that 'No agreement will suffice to create an apprenticeship unless an indenture is executed' must be radically revised in the light of the Apprentices Act, 1814, s. 2. And at p. 9, where the author writes that in the case of contracts not to be performed within a year, the legal process is 'entirely' excluded, the practical pre-requisite of express pleader does require mention.

On the statutory side, wages, factories, employers' liability and workmen's

compensation, trade unions, national health and allied insurance schemes and schemes of co-operation and voluntary welfare between employers and employees, all find their place. The recent National Insurance Acts have, however, rendered this major portion of the book transitional in design, in that the old and the new organisations of national insurance and employers' compensation have both had to be set out in successive chapters. In connection with workmen's compensation law, consideration of the important doctrine of election is surprisingly reduced to the scantiest proportions in Chapter V. This notwithstanding, the book as a whole reads easily and may be recommended to a similar group of readers as the *Law of Trade Unions*. A final point of interest should be noted: save for the first chapter dealing with apprentices, the master-servant dichotomy is nowhere to be found. The more modern employer-employee terminology is adopted and must certainly be considered more in accord with the temper of our times.

C. GRUNFELD.

CLARKE HALL AND MORRISON'S LAW RELATING TO CHILDREN AND YOUNG PERSONS INCLUDING THE LAW OF ADOPTION. Third Edition by A. C. L. MORRISON assisted by L. G. BANWELL. [London: Butterworth & Co., Ltd. 1947. 376 and (index) 29 pp. 37s. 6d. net.]

THE present third edition of this indispensable book, coming after an interval of five years since the second edition, embodies the law up to March 31, 1947. Most of the changes which had to be made were necessitated by the Education Act, 1944, parts of which are reproduced with brief annotations.

It is not the fault of the authors that so soon after its publication considerable sections of the present edition have become out of date or incomplete through the passing of the Criminal Justice Act, 1948, and of the Children Act, 1948.

HERMANN MANNHEIM.

PALMER'S COMPANY LAW. Eighteenth Edition by His Honour Judge TOPHAM, K.C. [London: Stevens & Sons, Ltd. 1948. cxiv and 806 pp. (with index). 35s. net.]

WE last published a review of *Palmer* in 1943 (6 M.L.R. 255). Since then there have been the Report of the Cohen Committee and its translation into the Companies Act, 1947. This new edition of *Palmer* is naturally much taken up with bringing the provisions of that statute into the text. As it was well known, and had in fact been officially announced, that a consolidation measure would be enacted as quickly as possible—it received the Royal Assent within a few weeks of the appearance of this volume—it is a little difficult to understand why the new edition could not wait until this had reached the Statute Book, for in the result the new edition has in one sense already become out of date. There have, of course, been quite a number of new decisions in the interval, *e.g.*, those dealing with the service of notices on shareholders abroad, issue of shares at a discount, criminal liability and other matters. The more important of these have been noted up by Judge Topham with his usual accuracy, but the harvest is less abundant than during most periods of similar length, so that the urgency of a new edition on that score can hardly be pleaded.

It is almost needless to say that the 1947 Act has been incorporated with the skilled draftsmanship for which the editor was well known when at the bar. We do not propose to comment upon it, however, as it has already been the subject of a note in this *Review* (see Vol. 11, 81), as well as an article on the Cohen Report (see Vol. 9, 235).

C.

COMPANY ACCOUNTS. By VIVIAN H. FRANK, M.A.(Cantab), F.C.A. [London : Sweet & Maxwell, Ltd. 25s. net.]

IN the preface of this book the author emphasises that the book is 'primarily concerned with the art of communicating and interpreting financial results'. It deals with the law and practice relating to Company Profit and Loss Accounts, Balance Sheets and Group Accounts, and is an invaluable guide to those concerned in the compilation of accounts for publication, as well as to investors.

The book embodies the important new Accounting provisions of the Companies Act, 1948, operating from July 1, 1948, and in the first chapter sets out very clearly the requirements of the new Act concerning accounts.

In an appendix are reproduced the published accounts of several well-known companies, but as these were all issued before June 30, 1948, they were prepared in compliance with the 1929 Act. It would have been better to delay publication so as to include published accounts which embody the most recent legislation.

There are suitable references to accountancy practice in the United States as well as to the Recommendations on Accounting Principles issued by the Council of the Institute of Chartered Accountants.

F. W. LITCHFIELD.

LA CRIMINALITÉ JUVÉNILE en tant que Phénomène économique et social. Par HENRI GIELB. Avec une préface du Professeur JOSEPH MAGNOL. [Varsovie. 1947. 93 pp.]

THE author of this little book is apparently a Pole with some first-hand experience of war-time conditions in England, France and Poland. The principal subjects discussed (most of them very briefly) are vagrancy; mendicancy; prostitution among juveniles; French and English statistics of juvenile delinquency; and the fight against it by way of repressive and preventive measures. As the title implies, the emphasis is throughout on social and economic rather than on psychological factors, and the author makes it clear that he regards the effect of hereditary factors as negligible.

The literature referred to and the statistical figures reproduced are mostly pre-war.

Although the book contains a few interesting observations, the problems under discussion are obviously too many and too complex to be adequately treated in a book of ninety-three pages, eighteen of which consist of various Prefaces, facsimiles of Prefaces, and the like.

HERMANN MANNHEIM.

THREE LECTURES ON THE COMPANIES ACT, 1947. Delivered by HENRY B. LAWSON, M.C., B.A., LL.B. [London : The Law Society. 1948. 58 pp. 2s. 6d. post free.]

IT is understood that when these three lectures were delivered in May of this year some of the audience found parts of them rather heavy going. This may have been because Mr. Lawson tended to over-estimate his hearers' powers of assimilation and attempted to cover too much ground. But though this may have detracted from their value as oral lectures it increases their value to the reader and this meaty little booklet will be most useful to all who require a handy guide to the major changes recently made to our company law. Its great advantage is that Mr. Lawson is not content merely to summarise the Act; he also emphasises points of difficulty and gives us the benefit of his opinion based on a wide practical experience and close association with the genesis of the Act.

L. C. B. G.

OYEZ PRACTICE NOTES. No. 1—Change of Name. By J. F. JOSLING. Second Edition. [London : The Solicitors' Law Stationery Society, Ltd. 1948. No price mentioned.]

ON twenty-three pages the author gives an account of the law and practice relating to change of name. In particular, he deals with Deed Polls, *i.e.*, the method of changing names with which practitioners are most frequently concerned. There are valuable points on the change of Christian names, but the author is at his best when dealing with standard questions likely to arise in everyday practice. He has included ten useful precedents, though the form of advertisement in the *London Gazette* (No. 6) might be shortened without loss of clarity.

F. A. MANN.

LA PUISSANCE PROTECTRICE EN DROIT INTERNATIONAL D'APRÈS LES EXPÉRIENCES FAITES PAR LA SUISSE PENDANT LA SECONDE GUERRE MONDIALE. [Basel : Helbing & Lichtenhahn. 1948. 79 pp. No price mentioned.]

THIS little book mainly consists of a description of Switzerland's experience during the second world war when she acted as Protecting Power for a great number of States. Although the book is published under the auspices of the Institute of International Law of Basel University, it does not aim at a close legal analysis of the position of a Protecting Power, but has an almost exclusively descriptive character. For a book of this type it would have been useful to publish source material bearing upon the relations between the Protecting Power and its principal, *e.g.*, upon the financial arrangements which must have been made, the scope of the Protecting Power's agency and so forth. As, however, the available literature on the subject is scanty, the author's contribution will be found a useful addition.

F. A. MANN.

THE PRINCIPLES OF LAND LAW UNDER THE LAND REGISTRATION ACT, 1925. Second Edition. By HAROLD POTTER, LL.D., Gray's Inn, Barrister-at-Law; Fellow and Dean of the Faculty of Laws of King's College, London, and Professor of English Law in the University of London. [London : Sweet & Maxwell, Ltd. 1948. xv and 128 pp. 15s. net.]

THE second edition of this interesting book shows many changes. There has been much rearrangement and rewriting of the text. Two new chapters have been added, one on Concurrent Interests (with some valuable new matter), and one on Mortgages and Charges. There are now Tables of Cases and Statutes. But despite many alterations of detail, the main argument is unaffected, and the last chapter, in which the author sums up his conclusions, has required practically no retouching.

This is no mere introduction to registered conveyancing. Essentially, it is a monograph on the interactions between Land Registration and the substantive law of land, and its importance rests partly upon the pioneer work which Professor Potter has done for us in this field, and partly upon the fact that it represents a crystallisation of his teachings as contained in his larger works on Land Registration. The author's ability and experience require us to give his opinions the attention they deserve; but, though we disagree with him at our peril, we feel that some of his views constitute a real danger to the smooth

working of land registration and must not be allowed to pass without challenge.

A glance through the pages of this book will be sufficient to show that in Professor Potter's opinion even the elementary principles of land registration are shrouded in obscurity. Now difficulties are bound to arise in construing the statute, but we may well doubt whether their number is as great as Professor Potter would have us believe. Some of them are clearly the secondary consequences of his own major premises. Thus, perhaps the central thesis of his book is that the estate of the registered proprietor is not the old common law estate but a new statutory estate, with statutory (and, it seems, exclusively statutory) incidents. Unfortunately, as the author points out, 'the draftsmen . . . neither completely defined the incidents of the registered estate nor left them to be inferred by reference to the Common Law. This ambiguity leaves the position uncertain'. We may thus well ask whether it is not possible, as it would clearly be desirable, to discard Professor Potter's thesis and so escape his ambiguities. He bases his opinion on the fact that the draftsmen found it necessary to define the proprietor's powers, instead of leaving them to be inferred as a necessary consequence of his ownership of a common law estate; 'this', he says, '. . . destroys the old common law owner beneficially entitled' (p. 102). We would suggest, however, that this argument fails to take account of the distinction between the existence of a power and the manner of exercising it, and that the Act, as a conveyancing Act, is primarily concerned with the latter and not with the former. Once this distinction is grasped it becomes evident that the draftsmen were compelled to specify the powers of a registered proprietor not in order to define them, much less to create them, but simply to indicate what section 69 (4) calls the 'manner authorised by this Act' for their exercise. If we adopt this view, we shall at least be spared the indignity of assuming, as Professor Potter is compelled to assume (pp. 60–1), that on the death of a registered proprietor his legal estate is *in nubibus* just because the Act is silent as to its devolution, a *reductio ad absurdum* which we will not willingly accept.

The two functions with which the Act is essentially concerned are, first, the manner of creating and transferring interests, and, second, the protection of interests once they are validly created. In the course of devising machinery for the protection of interests, the Act throws up the phrases 'overriding interests' and 'minor interests' as a convenient statutory shorthand. These two conceptions, together with what he (and the Rules) calls 'registrable interests', Professor Potter uses as the basis of a classification of substantive proprietary interests to replace the traditional classifications of ordinary land law. Now undoubtedly the technical method of protecting an interest against possible future interference will in some way affect its nature; but to use differences in technical methods of protection against hypothetical future dangers as the basis for defining the nature of the rights themselves is, to say the least, a highly questionable process, all the more so when the Act which creates those methods intends the statutory classification itself to be neither rigid nor exhaustive. Thus a legal easement may in some circumstances be an overriding interest (s. 70). But when the registered proprietor expressly creates a legal easement by registered disposition, notice must be entered on the register of the title to the servient tenement (s. 19 (2)). Now the definition of 'overriding interest' in section 3 (xvi) (unfortunately not mentioned by Professor Potter) expressly excludes interests entered on the register, so that a legal easement created and noted in the normal way is not an overriding interest. An even better illustration is the interest created by a lease containing an absolute prohibition against all dealings, an interest which Professor Potter considers to be a Minor Interest, and therefore equitable. Such a lease is at least a lease, and therefore a disposition authorised by section 18; it must therefore comply with the requirements of s. 19. Generally speaking, section 19 enacts that all dispositions under section 18 must be completed by registration

and noted. But by section 8 (2) a lease containing an absolute prohibition against all dealings cannot be registered. To meet this, and a similar point in relation to leases for twenty-one years or less, section 19 (2) states that a lease not required to be registered shall nevertheless take effect as a registered disposition immediately on being granted. What, then, is the nature of the interest under such a lease which is duly noted on the freehold register? It cannot be a minor interest, as Professor Potter suggests, for the definition (s. 3 (xv)) excludes interests created by registered dispositions. It is clearly not an overriding interest or a registrable interest. Obviously, therefore, it is a perfectly ordinary legal term of years, protected by notice as required by the Act. As long as an interest is protected, the Act is not concerned with it any further.

Difficulties in detail are bound to arise from any attempt to hammer out a new substantive law upon such an elastic anvil, and it is not surprising that Professor Potter's chapters on Overriding Interests and Minor Interests are full of them. Five pages of the former are devoted to the creation of incorporeal hereditaments. The passage itself is obscure, and we have not been able either to follow the author's arguments or to identify his conclusions; but it is fairly evident (see especially p. 50) that there is a tendency to confuse the future protection of interests validly created with the previous validity and hence the original creation of those interests. Once that distinction is grasped, the principles of the Act become quite clear. If a registered proprietor wishes to create one of the incorporeal hereditaments referred to in section 18, he must do so in the prescribed manner, and the transaction must be completed by the registration of the benefit in accordance with section 19. In the case of a legal rentcharge, registration involves the opening of a new, separate, register for the title to the rent. In the case of a legal easement, registration is necessary only if the title to the dominant tenement be registered, and will take the form of the insertion in the property register of a reference to the benefit. If the transaction is not so registered, it will not have been 'completed', so that no legal estate will have been created; the position would be analogous to that which would arise in ordinary conveyancing if a deed of grant were to be executed but not delivered.

Perhaps the most striking illustration of the dangers inherent in Professor Potter's method of interpretation is his treatment of section 101. Previous sections (*e.g.*, s. 18) have laid down the manner in which certain specified transactions must be effected. Section 101 is a sort of residuary section; any other 'permissible' interest may be created 'in like manner . . . as if the land were not registered'. Thus, an easement for life, not being a legal interest, does not come within the scope of section 18, which applies only to the creation and disposition of legal interests (s. 18 (4)), and so falls within section 101. Professor Potter does not include section 101 in his list of the powers of a registered proprietor, nor does he refer to it in relation to those powers. Instead, he chooses to discuss it under the heading 'Definition of Minor Interests'. More remarkably still, he arrives at the conclusion that the section applies only to equitable interests taking effect behind a settlement or a trust for sale. His reasoning appears to be this: By section 101 (2), all interests created under this section are to take effect as minor interests and are capable of being overridden by a registered disposition for value; the only minor interests capable of being so overridden in all circumstances are interests behind settlements and trusts for sale; therefore the section can apply only to interests behind settlements and trusts for sale. Unfortunately, he does not refer to section 101 (3), under which minor interests may be protected by notice, etc., or to section 52 (1), under which a registered disposition takes effect subject to all interests protected by notice, if they are valid and not, *independently of this Act*, overridden by the disposition. On any view of the general principles of the Act, Professor Potter's conclusions on this particular point cannot be accepted; but we have drawn attention to them because they

illustrate once again the difficulties which arise from a failure to distinguish clearly between the existence of a power, the manner of exercising it, and the subsequent protection of interests thereby created.

A further illustration, no doubt, is the author's striking neglect of section 107, an important section which not only completes the statutory system of protection but also helps to solve some of Professor Potter's own problems. An agreement for a lease is a contract and not a disposition, so that it does not come within the scope of either section 18 or section 101. Any proprietary interest to which it may give rise is the consequence of the equitable doctrines associated with the enforcement of contracts. With the emergence of such an equitable interest the Act is not concerned. It is, however, very much concerned with the protection of such an interest once it has arisen, and this protection is given by section 107; the enforceability of such a contract is to be a minor interest, requiring protection on the register if it is not to be overridden by a subsequent registered disposition for value. Similarly, a transfer for value of the fee simple not completed by registration will, no doubt, in accordance with principles well established in connection with void leases, be treated in equity as an agreement to complete by registration; again the enforceability of this implied agreement will be a minor interest requiring protection by notice under section 107. Professor Potter is much concerned that by section 70 a lease for twenty-one years or less is an overriding interest, and that by section 3 (x) 'lease' includes 'agreement for lease'. Here, he suggests, is an extension of *Walsh* v. *Lonsdale*, for such an agreement will be binding without notice or entry on the register. Again, another overriding interest is the 'rights of every person in actual occupation', and Professor Potter suggests, though with obvious reluctance, that if the purchaser under an unregistered conveyance goes into actual occupation, his rights may be protected as an overriding interest, thus undermining the fundamental principle of the Act. The answer to both problems is given by the express words of section 107; the only 'right' which in either case can bind a future purchaser is the right to enforce a contract against him, and this right is a minor interest requiring protection by notice.

We are fortified in our belief that the conclusions hitherto reached are sound by the fact that all of them bring the substantive law of registered land into conformity with the general rules of ordinary land law. Our own fundamental attitude to the Land Registration Act, as, indeed, it is to the bulk of the 1925 legislation as a whole, is that it is essentially a conveyancing Act, and that in consequence there is a very strong presumption against any interpretation of it which would involve a change in the substantive law of land. We do not think, however, that Professor Potter would accept this as the proper approach. In almost his last sentence he tells us that 'When registration of title has become compulsory in all parts of England and Wales, books on land law will be written that at first glance will be completely novel to those acquainted only with the old system'. Now this has a familiar ring; it is what we were all saying before 1926 when we began to study the rest of the property legislation, and we even re-wrote our textbooks so as to use section 1 of the Law of Property Act as a list of chapter headings—much to the bewilderment of our readers. What was perhaps even worse, the early decisions on the Acts adopted the same atmosphere of revolution, so that we were saddled with cases like *Re Kempthorne* and its bastard brood, a line of decisions which the future historian will class with *Shelley's Case* as a singular aberration of the judicial mind.

Today we are slowly emerging from this miasma, and, with the help of seasonable jolts from town and country planning, we are once again turning our minds to the fact that after all land law is something more than a handmaiden to conveyancing. We have still time to preserve registered land law from a repetition of our earlier mistakes, but to do so we must get clearly in our minds the relation between, and the relative importance of, land law and

conveyancing in modern society. For whom does land law exist? For the land owner and his neighbours, or for the conveyancer? Put in this way there can surely be only one answer to the question. Yet to the land owner, what is important is the substantive nature of his rights and duties; of those rights, the right to convey is merely one, and the technical method of exercising that right is to him of secondary importance and a matter which hitherto he has been content to leave in the hands of his technical advisers. If this be the true perspective, the time has surely long since passed when land law could be considered in the main as a secretion in the interstices of conveyancing.

A. D. HARGREAVES.

LAW OF COPYRIGHT. By W. W. COPINGER and F. E. SKONE JAMES. Eighth Edition. [London: Sweet & Maxwell, Ltd. 1948. xxii and 664 pp. £3 3s. net.]

COPINGER, edited by Skone James, is the standard book on the English Law of Copyright. It contains comprehensive information on the Nature and History of Copyright, on the Copyright Act, 1911, and ancillary statutes, on rules and orders affecting Copyright, on all the relevant case law and on arrangements between authors and publishers. In addition it deals briefly with International Copyright and the Copyright Laws of the British Dominions and the U.S.A.

The first edition of this work by Copinger appeared in 1870. The eighth edition by Skone James, published in 1948, is up to the high standards of the earlier editions. The chapters on Infringement of Copyright, Civil Remedies, and Arrangements between Authors and Publishers have been rewritten; they are now more systematically arranged and deal with several new problems not broached in earlier editions, such as 'television' and 'music while you work'. The case law has been brought up to date to the end of 1947.

Coming to minor criticisms, only twelve lines are devoted to the subject of the liability of authors and publishers to income tax. The decision of the Court of Appeal in *Nethersole* v. *Withers* (affirmed by the House of Lords in 1948) is referred to in a footnote on the chapter on Licences, but its implications on income tax are not dealt with. Information on the problem, often confronting authors, to what extent expenses may be deducted from royalties for income tax purposes is lacking. It might be argued that these problems belong more properly to a book on income tax law. However, since authors and publishers and their legal advisers have become used to rely on *Copinger* for complete information on agreements and arrangements in the realm of copyright law, they will surely be grateful to Skone James if he amplifies the paragraph on this subject in the next edition.

Skone James makes interesting comparisons between the protection afforded to authors and that afforded to inventors. He explains clearly that the copyright laws accord protection, not to ideas but to the particular expression of ideas; while the protection of the ideas themselves falls within the realm of the patent laws. Issue might be taken with Skone James's statement on p. 2 that 'the grant of a patent does prevent full use being made of knowledge'; indeed, the principal object of the grant of a patent monopoly is to induce the inventor to make his knowledge available to the public. A full discussion of this theme would, however, transgress the boundaries of a review.

The only other statement where author and reviewer disagree is on p. 84 and reads: 'Complaint can hardly be made that books are not cheap enough at the present day'.

Skone James explains the distinction between copyright and industrial designs. In this connection a reference to the relevant paragraphs of the Patent Law Reform Committee on the 'Demarcation between industrial designs

and literary and artistic work' may be of interest. In paragraphs 308–312 of its Final Report issued in 1947 the Committee deals with the uncertainty of the boundary line and makes several useful suggestions for reform.

Usually English law books are confined to an exegesis of the English law. Copinger/Skone James, however, give the text of and a great deal of most useful information on the Copyright Laws of the entire English-speaking world, particularly the U.S.A. The heading of this chapter might be described more appropriately as 'Dominion' or 'Commonwealth' Copyright rather than 'Colonial' Copyright.

The full text of the United States Copyright Act, 1909, is reproduced and a complete sub-chapter is devoted to the American law as it affects British authors. Minor amendments to the United States Copyright Act were enacted by United States Public Law 501 signed on April 27, 1948, after the eighth edition of Copinger/Skone James went to press. The present United States Act still preserves many of the cumbersome provisions of the English law before 1911 or even before 1842, such as the necessity for registration of the copyright, and a term of protection of twenty-eight years (renewable in the United States on express application for another twenty-eight years). In addition a 'copyright notice' on every published copy is necessary under United States law. Skone James justly chides the 'notorious manufacturing provisions' of the United States Act which deprive English authors of their copyright in books not printed from type set in the U.S.A.

Another praiseworthy feature of the book are submissions made by Skone James on points of copyright law not so far decided by the courts. Since, in English practice—as opposed to Continental practice—opinions by living commentators cannot usually be cited in court, the authors of most English legal textbooks ordinarily restrict their exposition to existing precedents and statutory provisions. Skone James does not hesitate to give his own opinion on undecided points; in view of his great experience this is most valuable for his readers.

Finally, the usefulness of the eighth edition of Copinger/Skone James is enhanced by clear print on thin fine quality paper, a good index, excellent marginal notes and a rich selection of forms and precedents.

Peter Meinhardt.

The Indian Law Review.

We are glad to call attention to the new *Indian Law Review*, a quarterly periodical which first made its appearance in 1947. Under the editorship of Mr. A. C. Ganguli, it has already attained a high standard of quality. We understand that the enterprise, which has the best wishes of the *Modern Law Review*, is due to the enthusiasm of a group of barristers practising in Calcutta. It will, in addition to general legal studies, be particularly concerned with law reform in India and have an international outlook.

On the Advisory Board along with the names of many distinguished Indian lawyers we notice those of Sir Maurice Gwyer and Professor Winfield. A number of the articles which appeared in the first volume have been contributed by English lawyers, and we think that the *Review* cannot fail to be of interest in this country and should do much to maintain the close and friendly relationship which has existed between lawyers in the two countries even when political relations were strained. Many contributions of high value to the elucidation of the common law have been made by Indians, and the present *Review* is a guarantee that these will not cease now that India has her own independent government.

The *Review* can be obtained from The Manager, *The Indian Law Review*, 6 Hastings Street, Calcutta, at an annual subscription of £1 5s.

C.